FGV Holdings Bhd (formerly known as 'Felda Global Ventures Holdings Bhd') v Mohd Isa bin Abdul Samad & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-807–11 OF 2018
MOHD ARIEF J
29 MARCH 2024

Companies and Corporations — Suit by company — Breach of fiduciary duties — Company chairman/non-executive director and Chief Executive Officer abused their positions by misappropriating company's properties and funds for their personal use and use of their families — Whether company had proven its case against the defendants — Whether defendants were liable to compensate company for the losses it had sustained by their actions — Whether exemplary damages were additionally payable by the defendants for the wanton self-serving manner in which they treated the company's properties

The plaintiff was a public-listed company that produced, inter alia, oil palm plantation products for a global market. At all material times, the first defendant ('D1') was the plaintiff's chairman and non-independent non-executive director whilst the second defendant ('D2') was its chief executive officer ('CEO') and, later, also the Group President. By virtue of their high offices in the company, the defendants owed fiduciary, common law and statutory duties to act in the best interests of the plaintiff at all times. The Troika was a three-tower luxury condominium located within the Kuala Lumpur City Centre area. On 23 June 2014, D2 proposed to the plaintiff's board of directors ('BOD') that it consider acquiring two units in the Troika both as an investment for the company as well to accommodate business associates or guests of the plaintiff during their business trips to Kuala Lumpur. The BOD agreed with the proposal and resolved to acquire two Troika units at a price of not more than RM10m. D2 was authorised to execute the resolution. Over the next four months, the plaintiff, through D2, purchased Unit A and Unit B in the Troika for, respectively, RM5.1m and RM3.3m. Shortly after vacant possession of the two units was delivered to the plaintiff, D1 and his family members went into occupation of Unit A and remained in occupation from October 2015 until July 2017 when D1 resigned from the BOD. Similarly, D2 and some members of his family occupied Unit B until April 2016 when he resigned as the CEO/Group President. Contrary to the purpose for which the BOD had approved the purchase of the Troika units, the defendants and their families treated the units like their own homes, decorating, renovating and furnishing the units, all at the expense of the plaintiff which also bore the maintenance and operational costs of the units. The BOD had also approved the leasing of five luxury vehicles for official use

by the company's senior management and directors ('the carpool system'). However, D2 took possession and control of all the vehicles, stationing three of them in his house for use by himself and his family members while he allowed the other two vehicles to be used by a select few of the plaintiff's directors. In the instant action, the plaintiff sued the defendants for breaching their fiduciary duties, acting against the interests of the plaintiff and causing the company to suffer loss and damage. Apart from abusing the carpool system, D2 had also misused the petrol cards the plaintiff had permitted him to use but had also failed to return them when his contract with the plaintiff ended.

Held, allowing the plaintiff's claims:

(1) As the chairman and CEO, respectively, of the plaintiff, the defendants had put themselves in a position of conflict, breached their fiduciary duties to the plaintiff and acted contrary to the best interests of the company. Without making any disclosure to the BOD, the defendants had unlawfully used the Troika units bought by the plaintiff for their personal use and for the use of their families. The defendants had gone on to furnish, renovate and decorate the two units according to their tastes and needs and as dictated by their wives and family members. All those expenses and the expenses for the upkeep of the units were entirely borne by the plaintiff. In addition, D2 had wrongly kept for himself and for his family members' use, three of the luxury vehicles in the plaintiff's carpool meant for the official use of senior management/directors of the company and had only allowed a select few directors to use the other two vehicles contrary to the purpose for which the carpool was formed. D2 had also abused the petrol card that was given to him and failed to return it to the plaintiff when his contract was terminated (see paras 167 & 172).

(2) The plaintiff had proven its claim for the following special damages against D1: (a) RM211,200 for loss of use of Troka Unit A based on a rental value of RM9,600 for 22 months; (b) RM295,130 incurred by the plaintiff in furnishing Unit A for D1's use; and (d) RM184,172.61 incurred by the plaintiff in maintaining Unit A thoughout D1's occupation of the Unit. In addition to the aforesaid, the court ordered D1 to pay the plaintiff RM300,000 in exemplary damages plus RM200,000 in costs (see para 195).

(3) The plaintiff had proven its claim for the following special damages against D2: (a) RM68,400 for loss of use of Troka Unit B based on a rental value of RM5,700 for 11 months and 16 days; (b) RM207,505.18 incurred by the plaintiff in furnishing Unit B; (c) RM97,591.95 incurred by the plaintiff in maintaining Unit B throughout D2's occupation of the unit; (d) RM1,444,371.63 being the loss suffered by the plaintiff in respect of the carpool vehicles; and

(e) RM10,837.10 incurred by the plaintiff for D2's use of the petrol card up till 14 April 2016. In addition to the aforesaid, the court ordered D2 to pay the plaintiff RM500,000 in exemplary damages plus RM200,000 in costs (see paras 183–186 & 195).

(4) The plaintiff had proven its claim for the carpool vehicles and the amounts it incurred under the petrol card against D2 and therefore he should compensate the plaintiff for the losses it had suffered. As three of the five cars in the carpool were wrongly used by D2 and his family members, he should repay the plaintiff the costs of the leasing incurred by the plaintiff (the formula used was the value of the leased cars at time of delivery minus their value at time of sale plus the maintenance costs incurred between the delivery date and the sale date). In respect of the other two vehicles that D2 had wrongly restricted to the exclusive use by some other directors, D2 was liable to pay a global sum of RM50,000 as damages for breach of fiduciary duty in that regard (see paras 181–184).

(5) The manner in which the defendants breached their fiduciary duties to the plaintiff in this case warranted an award of exemplary damages against them. A higher amount was imposed against D2 as he was the CEO of the plaintiff and, in that position, he should rightly have taken all steps to prevent the abuse of the company's assets. The higher award against D2 was to warn those in the industry that such breaches would not be tolerated (see paras 187–193).

[Bahasa Malaysia summary

Plaintif adalah sebuah syarikat tersenarai awam yang menghasilkan, antara lain, produk perladangan kelapa sawit untuk pasaran global. Pada setiap masa yang material, defendan pertama ('D1') adalah pengerusi plaintif dan pengarah bukan bebas bukan eksekutif manakala defendan kedua ('D2') adalah ketua pegawai eksekutifnya ('CEO') dan, kemudiannya, juga Presiden Kumpulan. Berdasarkan jawatan tinggi mereka dalam syarikat, defendan mempunyai kewajipan fidusiari, undang-undang am dan kewajipan berkanun untuk bertindak demi kepentingan terbaik plaintif pada setiap masa. The Troika adalah sebuah kondominium mewah tiga menara yang terletak di dalam kawasan Pusat Bandar Kuala Lumpur. Pada 23 Jun 2014, D2 mencadangkan kepada lembaga pengarah plaintif ('BOD') bahawa ia mempertimbangkan untuk memperoleh dua unit dalam Troika sebagai pelaburan untuk syarikat tersebut juga untuk menempatkan rakan perniagaan atau tetamu plaintif semasa perjalanan perniagaan mereka ke Kuala Lumpur. BOD bersetuju dengan cadangan tersebut dan memutuskan untuk memperoleh dua unit Troika pada harga tidak melebihi RM10 juta. D2 diberi kuasa untuk melaksanakan resolusi tersebut. Dalam tempoh empat bulan berikutnya, plaintif, melalui D2, membeli Unit A dan Unit B dalam Troika masing-masing, RM5.1 juta dan RM3.3 juta. Sejurus selepas pemilikan kosong kedua-dua unit diserahkan kepada plaintif, D1 dan ahli keluarganya

telah menduduki Unit A dan kekal diduduki dari Oktober 2015 hingga Julai 2017 apabila D1 meletak jawatan daripada BOD. Begitu juga, D2 dan beberapa ahli keluarganya menduduki Unit B sehingga April 2016 apabila beliau meletakkan jawatan sebagai CEO/Presiden Kumpulan. Bertentangan dengan tujuan yang mana BOD telah meluluskan pembelian unit Troika, defendan dan keluarga mereka menganggap unit tersebut seperti rumah mereka sendiri, menghias, mengubahsuai dan menyediakan kelengkapan unit, semuanya atas perbelanjaan plaintif yang juga menanggung penyelenggaraan dan kos operasi unit. Lembaga Pengarah juga telah meluluskan pajakan lima kenderaan mewah untuk kegunaan rasmi oleh pengurusan kanan dan pengarah syarikat ('the carpool system'). Bagaimanapun, D2 mengambil alih dan mengawal semua kenderaan itu, menempatkan tiga daripadanya di rumahnya untuk kegunaan sendiri dan ahli keluarganya manakala dia membenarkan dua lagi kenderaan itu digunakan oleh beberapa pengarah terpilih plaintif. Dalam tindakan semasa, plaintif menyaman defendan kerana melanggar kewajipan fidusiari mereka, bertindak bertentangan dengan kepentingan plaintif dan menyebabkan syarikat mengalami kerugian dan kerosakan. Selain menyalahgunakan sistem carpool, D2 juga telah menyalahgunakan kad petrol yang dibenarkan plaintif untuk digunakan tetapi juga gagal memulangkannya apabila kontraknya dengan plaintif tamat.

Diputuskan, membenarkan tuntutan plaintif:

(1) Sebagai pengerusi dan Ketua Pegawai Eksekutif, masing-masing, untuk plaintif, defendan telah meletakkan diri mereka dalam kedudukan konflik, melanggar kewajipan fidusiari mereka kepada plaintif dan bertindak bertentangan dengan kepentingan terbaik syarikat. Tanpa membuat sebarang pendedahan kepada BOD, defendan telah menggunakan unit Troika yang dibeli secara tidak sah oleh plaintif untuk kegunaan peribadi mereka dan untuk kegunaan keluarga mereka. Defendan telah menyediakan, mengubah suai dan menghias kedua-dua unit mengikut citarasa dan keperluan mereka dan seperti yang ditentukan oleh isteri dan ahli keluarga mereka. Semua perbelanjaan tersebut dan perbelanjaan untuk penyelenggaraan unit-unit tersebut ditanggung sepenuhnya oleh plaintif. Di samping itu, D2 telah secara salah menyimpan untuk dirinya sendiri dan untuk kegunaan ahli keluarganya, tiga daripada kenderaan mewah dalam carpool plaintif yang dimaksudkan untuk kegunaan rasmi pengurusan kanan/pengarah syarikat dan hanya membenarkan beberapa pengarah terpilih untuk menggunakan dua lagi kenderaan yang bertentangan dengan tujuan carpool itu dibentuk. D2 juga telah menyalahgunakan kad petrol yang diberikan kepadanya dan gagal mengembalikannya kepada plaintif apabila kontraknya ditamatkan (lihat perenggan 167 & 172).

(2) Plaintif telah membuktikan tuntutannya untuk ganti rugi khas berikut terhadap D1: (a) RM211,200 untuk kehilangan penggunaan Troka

Unit A berdasarkan nilai sewa RM9,600 selama 22 bulan; (b) RM295,130 ditanggung oleh plaintif dalam memberikan Unit A untuk kegunaan D1; and (c) RM184,172.61 yang ditanggung oleh plaintif dalam mengekalkan Unit A sepanjang D1 menduduki Unit tersebut. Sebagai tambahan kepada perkara yang disebutkan di atas, mahkamah memerintahkan D1 membayar plaintif RM300,000 sebagai ganti rugi teladan ditambah RM200,000 bagi kos (lihat perenggan 195).

(3) Plaintif telah membuktikan tuntutannya untuk ganti rugi khas berikut terhadap D2: (a) RM68,400 untuk kehilangan penggunaan Troka Unit B berdasarkan nilai sewa RM5,700 untuk 11 bulan dan 16 hari; (b) RM207 ,505.18 yang ditanggung oleh plaintif dalam memberikan Unit B; (c) RM97,591.95 yang ditanggung oleh plaintif dalam menyelenggara Unit B sepanjang D2 menduduki unit tersebut (d) RM1,444,371.63 sebagai kerugian yang dialami oleh plaintif berkenaan dengan kenderaan carpool; dan (e) RM10,837.10 yang ditanggung oleh plaintif untuk penggunaan kad petrol D2 sehingga 14 April 2016. Sebagai tambahan kepada perkara yang disebutkan di atas, mahkamah memerintahkan D2 membayar plaintif RM500,000 sebagai ganti rugi teladan dengan kos RM200,000 (lihat perenggan 183–186 & 195).

(4) Plaintif telah membuktikan tuntutannya untuk kenderaan carpool dan amaun yang ditanggung di bawah kad petrol terhadap D2 dan oleh itu dia harus membayar pampasan kepada plaintif bagi kerugian yang dialaminya. Memandangkan tiga daripada lima kereta di dalam carpool telah digunakan secara salah oleh D2 dan ahli keluarganya, dia harus membayar balik plaintif kos pajakan yang ditanggung oleh plaintif (formula yang digunakan adalah nilai kereta yang dipajak pada masa penghantaran ditolak nilai pada masa jualan ditambah kos penyelenggaraan yang ditanggung antara tarikh penghantaran dan tarikh jualan). Berkenaan dengan dua kenderaan lain yang telah disekat oleh D2 secara salah kepada penggunaan eksklusif oleh beberapa pengarah lain, D2 bertanggungjawab untuk membayar jumlah global RM50,000 sebagai ganti rugi untuk pelanggaran kewajipan fidusiari dalam hal tersebut (lihat perenggan 181–184).

(5) Cara defendan melanggar kewajipan fidusiari mereka kepada plaintif dalam kes ini memerlukan pemberian awad ganti rugi teladan terhadap mereka. Jumlah yang lebih tinggi telah dikenakan terhadap D2 kerana beliau adalah Ketua Pegawai Eksekutif plaintif dan, dalam kedudukan itu, beliau sepatutnya mengambil semua langkah untuk mencegah penyalahgunaan aset syarikat. Awad yang lebih tinggi terhadap D2 adalah untuk memberi amaran kepada mereka dalam industri bahawa pelanggaran tersebut tidak akan diterima (lihat perenggan 187–193).]

Cases referred to

Acumen Scientific Sdn Bhd v Yeow Liang Ming [2020] 3 MLJ 82; [2021] 2 CLJ 369, CA (refd)
AIB Group (UK) plc v Mark Redler & Co [2014] UKSC 58, SC (refd)
Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors [1985] 2 MLJ 209; [1985] CLJ Rep 37, SC (refd)
BIT Baltic Investment & Trading Pte Ltd (in compulsory liquidation) v Wee See Boon [2023] SGCA 17, CA (refd)
Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 5 MLJ 1; [2011] CLJU 232, CA (refd)
Bristol and West Building Society v Mothew [1998] Ch 1, CA (refd)
Chamberlain v The Queen (No 2) [1984] HCA 7, HC (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (folld)
City Equitable Fire Insurance Company, Limited, In re [1925] Ch 407, Ch D (refd)
Dato' Mohamad bin Shahul Hameed v Datin Mazita bt Osman [2023] 6 MLJ 544; [2023] 8 CLJ 526, CA (refd)
Dovey v Cory [1901] AC 477, HL (refd)
Ever-Yield Sdn Bhd v Yap Keat Choon and other appeals [2023] 2 MLJ 90; [2023] 1 CLJ 345, CA (refd)
Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd) [2014] 3 SLR 329, CA (refd)
Kumpulan Powernet Bhd & Anor v Woo Wai Mun & Ors (Fong Wai @ Foong Ai Ming & Anor, third parties) [2023] MLJU 2662; [2013] CLJU 2384, HC (refd)
Lim Hean Chong @ Teo Hean Chong v PP [2012] 1 MLJ 149; [2012] 2 CLJ 1046, CA (refd)
Maraputra v Kumagai [1999] MLJU 679; [2000] 2 CLJ 311, HC (refd)
Mohd Imran bin Mohd Ramly & Anor v PP and another appeal [2020] 6 MLJ 370; [2020] 6 CLJ 705, CA (refd)
Nash v Volskwagen Financial Services (UK) Ltd [2023] EWHC 2326 (KB), KBD (refd)
New Acres Sdn Bhd v Sri Alam Sdn Bhd [2000] 2 MLJ 353, FC (refd)
Ng Pak Cheong v Global Insurance Co Sdn Bhd [1995] 1 MLJ 64; [1995] 1 CLJ 223, HC (refd)
Ng Thian Soong v PP [1990] 2 MLJ 148; [1990] 1 CLJ 1107, SC (refd)
Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd [2016] 3 MLJ 708, CA (refd)
Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai & Anor and other appeals [2018] 4 MLJ 461; [2018] 4 CLJ 323, CA (refd)
Parker v Tucker (No 2) [2010] FCA 624, FC (refd)
Petra Perdana Berhad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors [2014] MLJU 267; [2014] CLJU 236, HC (refd)
Philip ak Uja v PP [2023] 6 MLJ 866; [2023] 1 LNS 1937, CA (refd)

Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616; [2012] 5 CLJ 169, CA (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 1 CLJ 133, HC (refd)
Quemax Sealing (M) Sdn Bhd v Norita bt Anis & Anor [2022] MLJU 3560; [2022] CLJU 3276, HC (refd)
R v Exall & Others (1866) 176 ER 850 (refd)
Re Barings plc and others (No 5), Secretary of State for Trade and Industry v Baker and others (No 5) [1999] 1 BCLC 433, Ch D (refd)
In re Duomatic Ltd [1969] 2 Ch 365, Ch D (refd)
Re Haeusler, Thomas [2021] 4 SLR 1407, HC (refd)
Rhesa Shipping Co SA v Edmunds [1985] 1 WLR 948, HL (refd)
Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals [2020] SGCA 35; [2020] 1 SLR 1199, CA (refd)
Howard Smith Ltd v Ampol Petroleum Ltd and others [1974] AC 821, PC (refd)
Soh Chee Gee v Syn Tai Hung Trading Sdn Bhd [2019] 2 MLJ 379, CA (refd)
Suruhanjaya Sekuriti Malaysia v Lim Kok Boon & Anor [2019] MLJU 937; [2019] 1 LNS 1269, HC (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)
Target Holdings Ltd v Redferns (a firm) [1996] 1 AC 421, HL (refd)
Tenaga Nasional Bhd v Transformer Repairs & Services Sdn Bhd & Ors [2024] 1 MLJ 653; [2023] 1 LNS 2310, CA (refd)
Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal [2018] 2 MLJ 177; [2018] 2 CLJ 641, FC (refd)
Torvale Group Ltd, Re [1999] 2 BCLC 605, Ch D (refd)
Toyota Tsusho (Malaysia) Sdn Bhd v Foo Tseh Wan & Ors [2023] MLJU 289; [2023] 1 LNS 227, HC (consd)
Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors [2019] 1 MLJ 421; [2019] 2 CLJ 261, CA (refd)
Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor [2012] MLJU 159; [2015] 5 CLJ 229, CA (refd)

Legislation referred to

Capital Markets and Services Act 2007 s 200
Companies Act 1965 ss 214, 132

Andrew Chiew Ean Vooi (with Hoi Jack S'ng, Chris Lim Yen Hao and Jeremia Majantim-Goh) (Lee Hishammuddin Allen & Gledhill) for the plaintiff.
Lavinia Kumaraendran (with Mavin Thillainathan (Lavania Balan & Chambers) for the first defendant.
Vincent Lawrence (with Abdul Rahim Abd Hadi and Mohammad Emir Feizal) (Lawrence Hisham & Co) for the second defendant.

Mohd Arief J:

A. INTRODUCTION

[1] This case exemplifies the importance of governance in publicly listed companies and how those who are entrusted with the powers of the Chairman of a publicly listed company and as the Chief Executive Officer/President of a publicly listed may wrongly use such powers and position to their benefit.

[2] This case also signifies the importance of a robust board of directors who are aware of their duties and obligations and how a weak board could open doors and avenues for abuse. Thus, there is a clear need that publicly listed companies, especially government-linked entities, to ensure that robust and accountable Directors are appointed to ensure that all internal processes are complied with and not abused.

[3] The claim revolves around the following issues:

Troika units acquisitions and use:

(a) whether it was the defendants that had caused the plaintiff to agree to purchase the Troika condominium units;

(b) whether the purchase of the Troika units was undertaken through the internal procedures of the plaintiff:

  (i) did the defendants cause the plaintiff to purchase the Troika units without due and proper regard to their market value and/or long-term appreciation of the properties?

  (ii) did the defendants cause the plaintiff to acquire, renovate, furnish, and maintain the Troika units without due and proper regard for the costs and stipulations under the plaintiff's discretionary authority (DAL)?

  (iii) did the defendants cause the plaintiff to purchase and undertake works on the Troika units contrary to the procurement policies and procedures of the plaintiff?

(c) whether the purchase of the Troika units was undertaken for an appropriate purpose:

  (i) did the defendants plan that the said units were bought for their use contract to what was represented to the Board of Directors?

(ii) did the defendants obtain approval for the said units to be utilised by them?

(iii) did the defendants inform the Board of Directors and the shareholders of the plaintiff that they were using the said units?

(d) did the defendants use Troika units purchased by the plaintiff? (Troika Unit A — defendant and Troika Unit B — second defendant);

(e) were the defendants involved in the furnishing and all works undertaken by the plaintiff concerning the Troika units?

(f) whether the second defendant failed to properly negotiate the terms of the lease of the MCB S500 and Brabus B50 which caused the plaintiff to be liable for the vehicle;

(g) did the defendants breach any of their fiduciary duties owed to the plaintiff concerning the acquisition and purchase of the Troika units?

(h) whether the plaintiff suffered any damages as a result of the breach of the fiduciary duties owed by the defendants;

(i) whether the defendants had breached the plaintiff's Code of Ethics and Conduct, the plaintiff's Board Charter, the plaintiff's Entitlement Policies, and other procedures laid down by the plaintiff;

(j) whether the defendants had breached their duties owed to the plaintiff either in common law, contract or as provided under statute and caused damage to the plaintiff.

Pool cars:

(k) whether the second defendant has abused the pool car system set up by the plaintiff's Board of Directors;

(l) whether the plaintiff suffered any damages as a result of the abuse of the pool car system allegedly by the second defendant.

Petrol cards:

(m) whether the second defendant had caused damage to the plaintiff due to the abuse or wrong use of the petrol cards.

[4] The defendants' defence is summarised as follows:

(a) first defendant defence:

(i) the first defendant was not involved in the discussions or deliberations pertaining to the acquisition of the Troika units;

(ii) the first defendant is not involved in the preparation, review, or approval process of the paper presented to the Board of Directors by the plaintiff's management dated 23 June 2014. The said acquisition was presented and prepared by the plaintiff's management/Exco without any input or involvement of the first defendant;

(iii) the said acquisition was approved by the Board of Directors on 23 June 2014. This was a business judgment, and it was appropriate and reasonable based on the board paper presented to the Board of Directors;

(iv) the furnishing and installation works on Troika Unit A were undertaken in accordance with the policies and procedures of the plaintiff without any involvement of the first defendant;

(v) the first defendant was given express approval to utilise and reside in Troika Unit A. Members of the Board of Directors and senior management of the plaintiff are aware and approve the first defendant's right to reside and utilise unit A;

(vi) the Troika units were purchased based on the express approval of the Board of Directors and need not go through the investment committee;

(vii) the first defendant was not involved in the use of the pool cars; and

(viii) the plaintiff has not suffered any damages as the Troika units have not been sold.

(b) second defendant's defence:

(i) the second defendant or the first defendant was not involved in the steps to cause the acquisition of the Troika units;

(ii) the acquisition of the Troika units was undertaken in accordance with the protocols and procedures of the plaintiff;

(iii) the said acquisition was mooted and suggested by the legal and procurement team of the plaintiff. The second defendant did not

wrongfully cause the acquisition of the Troika units, and this was undertaken by the internal management of the plaintiff. The acquisition was also undertaken independently and with the independent assessment/approval of the plaintiff's Board of Directors;

(iv) the procurement and the Facilities Management Unit (FMU) of the plaintiff were responsible for the Troika units and the furnishing of the said units. The second defendant did not wrongfully cause the furnishments of the Troika units, instead, this was undertaken with the consent of the Chief Human Resources Officer as well as the Facilities Management team;

(v) the second defendant or his family member did not have exclusive use and did not possess Unit B;

(vi) the purchase of the Troika units was made in accordance with the approvals of the Board of Directors of the plaintiff;

(vii) the pool cars were arranged by the procurement department of the plaintiff and did not involve the second defendant or initiated by the second defendant. The lease of the pool cars was also undertaken independently by the plaintiff's management in accordance with the internal policies, code of conduct, and procedures of the plaintiff;

(viii) the second defendant did not control the pool cars and did not establish the system to utilise the pool cars system;

(ix) the pool car system was established with the approval of the Board of Directors and the directors were aware of the said pool car acquisition and the existence of the same;

(x) the second defendant was also entitled to use the cars in the pool car system;

(xi) the second defendant did not wrongly use the cars in the pool car system or wrongfully use the petrol cards. There was not any loss of use of the pool cars as they were always available to be utilised by plaintiff's senior management and its members of the Board of Directors;

(xii) the plaintiff has not suffered any damage as the Troika Units have not been sold; and

(xiii) the defendants did act in the best interests of the plaintiff at all material times.

B. SUMMARY OF THE DECISION OF THIS COURT

[5] After considering the pleadings, evidence presented by the litigants, and submissions filed, I am satisfied that the plaintiff has proven its claim against the defendant. I find that, on the balance of probabilities:

(a) that the plaintiff has failed to prove that the defendants had wrongfully caused the plaintiff to acquire the Troika units in breach of their duties to the company;

(b) that the acquisition of the Troika units was made in accordance with the decision of the Board of Directors dated 23 June 2014;

(c) that the plaintiff did not suffer any damage as a result of the acquisition of the Troika units;

(d) that the defendants did unlawfully use the said Troika units and did not disclose to the Board of Directors that they were using the said Troika units;

(e) that the defendants did unlawfully cause the plaintiff to incur substantial costs to furnish the Troika units contrary to their duties owed to the company. The defendants had also failed to ensure that this was undertaken in accordance with the internal policies of the company;

(f) that the second defendant did breach his duties to the plaintiff by abusing the carpool system;

(g) that the second defendant did abuse the petrol card supplied to him. The second defendant had failed to return the petrol card to the plaintiff; and

(h) that the plaintiff did suffer damages as a result of the defendants' alleged wrongful acts.

C. FACTS NOT IN DISPUTE

[6] The plaintiff is a publicly listed company and is a global agricultural and agri-commodities company that produces, among others, oil palm plantation products.

[7] The first defendant was the plaintiff's chairman and non-independent non-executive director between 1 January 2011 and 19 June 2017.

[8] The second defendant was the plaintiff's Chief Executive Officer ('CEO') designate between 1 January 2013 to 14 July 2013. Subsequently, he was the plaintiff's Group President/CEO between 15 July 2013 and 1 April 2016.

A **[9]** The first defendant owes a duty to the plaintiff as Chairman and non-independent non-executive director of the plaintiff's Board of Directors ('Board') under common law and statute.

B **[10]** The first defendant, as the Chairman of the Board, also owes a duty to the plaintiff under the plaintiff's Board Charter.

[11] The Troika is a three-tower luxury condominium located at 19, Persiaran KLCC, 50450 Kuala Lumpur.

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[12] On 23 June 2014, the second defendant submitted a proposal and sought the approval of the plaintiff's Board to acquire two condominium units at the Troika for the maximum price of RM10m including all incidental costs.

D **[13]** Pursuant to the Board Paper titled 'Proposed Acquisition of two units of the Troika Condominium at Jalan Binjai, 50450 Kuala Lumpur', the second defendant recommended to the Board to acquire the Troika units advancing the following reasons:

E (a) the acquisition would be a good investment to be considered as it would enable the plaintiff to participate in long-term property value appreciation within the vicinity of KLCC; and

(b) to provide accommodation for the plaintiff's business associate or guests during their business trip to Kuala Lumpur.

F

[14] On 23 June 2014, the Board resolved to:

(a) acquire the Troika units at a purchase consideration of not more than RM10m; and

G (b) authorise the second defendant to execute the relevant documents.

[15] On 29 September 2014, the plaintiff entered into two sale and purchase agreements to acquire Unit A for RM5,134,902 and Unit B for RM3,283,770 executed by the second defendant on behalf of the plaintiff.

H

[16] On 20 October 2014, vacant possessions of the Troika Units were delivered.

I **[17]** The first defendant and his family members occupied Unit A starting from 1 October 2015 to 25 July 2017.

[18] The first defendant returned possession of Unit A to the plaintiff in July 2017 upon his resignation from the plaintiff's Board in June 2017.

[19] The second defendant returned the access keys to Unit B to the plaintiff in April 2016 upon his resignation as CEO/Group President of the plaintiff.

[20] The Board of Directors has also approved the implementation of a carpool system to be utilised by senior management of the company and directors in carrying out their duties for the company.

[21] This carpool system was proposed by senior management of the company to the remuneration committee as seen in the paper presented to the Board.

[22] The remuneration committee agreed to the said proposal and this issue was brought to the attention of the board. The board unanimously agreed to the said proposal as seen in the resolution passed by the Board

[23] The second defendant and his subordinates sought inquiries from third parties and eventually landed with Naza as the provider for the said cars. The board agreed to lease four units of Mercedes Benz which included one unit of S500, one unit of S350 to be utilised by the defendants, four E250 as well as one Toyota Vellfire. These five units will be shared and utilised by the senior management and other directors of the plaintiff.

[24] A contract with Naza Venture Holdings Sdn Bhd was entered into on 25 June 2011. The vehicles were leased by the plaintiff from Naza.

[25] The lease was subsequently terminated by the plaintiff.

D. APPLICABLE LEGAL PRINCIPLES

General legal principles on directors' duties

(i) Fiduciary duties of directors

[26] As directors of the plaintiff, it is trite that the said defendants owed a duty to act at all times in the best interest of the company I refer to the decision of the Federal Court in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra v Petra Perdana Bhd and another appeal* [2018] 2 MLJ 177; [2018] 2 CLJ 641 where Azahar Mohamed FCJ (as he then was) held:

> [172] One of the important principles of law that can be distilled from the case of *Charterbridge Corporation Ltd v Lloyds Bank Ltd* was that the test for breach of duty of a director and acting in 'the interest of the company' has an objective element: whether an honest and intelligent man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company.

[173] This principle has come to be known as the 'Charterbridge principle' (per Zainun Ali JCA (as Her Ladyship then was) in *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor)*. As correctly stated by Pearlie MC Koh on *Company Law*, at p 112, it is an objective element in the test in the sense that this was done by reference to what an honest and intelligent man in the position of the directors would have done. Elsewhere at p 301, the learned writer stated that 'the tension between commercial reality and the requirements of the law is alleviated somewhat by the adoption of an objective formulation of the test for breach of directors' duty'.

[174] The Singapore Court of Appeal in the case of *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR (R) 1064 accepted Pennycuick J's formulation in *Charterbridge Corporation Ltd v Lloyds Bank Ltd*. The Singapore Court of Appeal in applying the objective element in the test had this to say:

> Counsel for the appellants relied on this dicta and submitted that the circumstances here were not such as to lead to an inference of dishonesty on the part of the directors of the respondents, but were such that a reasonable man could have inferred that the transactions were entered into bona fide by the directors in the interests of the respondents. He contended that as the directors of the respondents were also the directors of City Carton, they had considered the group as an economic entity and therefore acted for the benefit of the group as a whole. At the same time, he submitted that the directors would have reasonably regarded the equity participation of the appellants as beneficial to the respondents. We accepted this submission. We were of the opinion that an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the respondents. There was clearly no evidence that the directors of the respondents had acted in breach of their duties to the respondents.

[175] In *Spedley Securities Ltd (in liq) v Greater Pacific Investments Pty Ltd (in liq)* [1992] 7 ACSR 155, a 'round robin' of transactions was effected by Mr Yuill (a director of *Spedley Securities Ltd (in liq)* (*Spedley*)) and others, essentially with the purpose of 'cleaning up' the balance sheet of Spedley. An action was brought to determine the validity of the various transactions. Cole J applied the objective element in the test as follows:

> The test to be applied in considering the actions of Mr Yuill in effectively denuding GPIL of substantial assets by transferring them to GPI and P152 so that the funds could be returned ultimately to SSL and thus improve its balance sheet is that enunciated in *Charterbridge Corp Ltd v Lloyds Bank Ltd* [1970] Ch 62 at 74: As an intelligent and honest man in the position of a director of GPIL, do I, in the whole of the existing circumstances, reasonably believe that the transactions are for the benefit of GPIL.

[176] A principal error of the Court of Appeal in the present case was its failure to consider *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor*, which applied the objective element in the test. In delivering the judgment of the Court of Appeal, this was what Zainun Ali JCA (as Her Ladyship then was) said:

> The prior provision of s 132(1) requires a director to act honestly. The current s 132(1) of the Act requires a director to act in good faith in the best interest of the

company. It is accepted that for all intents and purposes, the scope of the directors' duties to act honestly under the old s 132(1) and the new s 132(1) are the same. Thus the old case laws relating to the duty to act honestly continue to be relevant.

[177] Her Ladyship further said:

The test is nicely condensed in *Ford's Principles of Corporations Law* (para 8.060), that there will be a breach of duty if the act or decision is shown to be one which no reasonable board could consider to be within the interest of the company. This test is adopted in *Charterbridge Corpn Ltd v Lloyds Bank Ltd* [1970] Ch 62 at p 74, in that, to challenge a decision of the directors, the test is whether: ... an intelligent and honest man in the position of the director of the company concerned, could in the whole of the existing circumstances have reasonably believed that the transactions were for the benefit of the company. The above principle is often referred to as the 'Charterbridge Principle'.

[178] In our judgment, the above passage from the judgment of *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* states correctly the objective element in the test of whether a director acted in the 'best interest of the company'. It is against this benchmark that one must assess the decision of the defendants in the present appeals in the divestments of a substantial portion of the plaintiff's shareholding in PEB. (Emphasis added.)

I also refer to *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616; [2012] 5 CLJ 169; *Bristol and West Building Society v Mothew* [1998] Ch 1; *Ng Pak Cheong v Global Insurance Co Sdn Bhd* [1995] 1 MLJ 64; [1995] 1 CLJ 223; *Kumpulan Powernet Bhd & Anor v Woo Wai Mun & Ors (Fong Wai @ Foong Ai Ming & Anor, third parties)* [2023] MLJU 2662; [2013] CLJU 2384 and *Acumen Scientific Sdn Bhd v Yeow Liang Ming* [2020] 3 MLJ 82; [2021] 2 CLJ 369.

[27] This court must ascertain whether the said defendants had acted in the best interest of the plaintiff. This will be looked at objectively with reference 'to what an honest and intelligent man in the position of the directors would have done' based on the facts of this case. I must determine 'whether an honest and intelligent man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company.'

[28] It is also important that I reproduce the decision of Salleh Abas LP in *Avel Consultants Sdn Bhd & Anor v Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209; [1985] CLJ Rep 37:

The law is clear that a director of a company is in fiduciary relationship with his company and as such he is precluded from acting in a manner which will bring his personal interest into conflict with that of his company.

(ii) Common law duty of care owed by directors to a company

[29] I also note the duty of care owed by directors to the company under the Common law. This could be seen in the decision of the House of Lords in *Dovey v Cory* [1901] AC 477 where Halsbury LC said:

> The charge of neglect appears to rest on the assertion that Mr Cory, like the other directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon the distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible. Was Mr Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairman were all alike deceiving him? That the letters of the auditors were kept from him to clear. That he was assured that provision had been made for bad debts, and that he believed such assurance, is involved in the admission that he was guilty of no moral fraud; so that it comes to this, that he ought to have discovered a network of conspiracy and fraud by which he was surrounded, and found out that his own brother and the managing directors (who have since been made criminally responsible for frauds connected with their respective offices) were including him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. *I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculation of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management.* If Mr Cory was deceived by his own officers — and the theory of his being free from moral fraud assumes under the circumstances that he was — there appears to me to be no case against him at all. The provision made for bad debts, it is well said, was inadequate; but those who assured him that it was adequate were the very persons who were to attend to that part of the business; and so of the rest. If the state and condition of the bank were what was represented then no one will say that the sum paid in dividends was excessive.

[30] I also refer to the often-quoted decision of Romer J in *In re City Equitable Fire Insurance Company, Limited* [1925] Ch 407:

> A director must of necessity trust to the officials of the company to perform properly and honestly the duties allocated to those officials. In many large companies — it was so in the case of the City Equitable — it is the duty of the manager to pay the salaries and wages of the staff. For that purpose, cheques are drawn by the directors in his favour, the exact amount required being calculated by him. *So long as there is nothing suspicious about the amount, the directors are justified in trusting him to calculate the correctly, and to use the proceeds of the cheque for the purpose of which it was drawn. The fact, therefore, that a respondent director signed cheques in favour of Mansell for or on account of commission does not necessarily make him responsible to the company for any payments so made to Mansell in excess of what was really due to him. In order to*

determine whether any respondent director can be made so liable, I must consider the circumstances in which he signed the cheques in question for the purpose of seeing whether there was anything that should have put him on inquiry, either by reason of the amounts of which the cheques were drawn, or of any irregularity in the method in which they were presented to him for payment.

[31] The same principles could also be seen in *Re Barings plc and others (No 5), Secretary of State for Trade and Industry v Baker and others (No 5)* [1999] 1 BCLC 433 where the English Court held:

(i) Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.

(ii) Whilst directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions.

(iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director's role in the management of the company.

[32] The exercise of the duty of care owed by each director to the plaintiff will depend on their role in the company and all the circumstances of each case. This could be seen in the decision of the Singapore Court of Appeal in *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)* [2014] 3 SLR 329 where a director was held liable for bribes paid to a third party by a subordinate to obtain contracts for the company.

[33] In that case, the Singaporean Court held that the director had failed to exercise reasonable diligence in discharging his duties as the CEO, by merely relying on his subordinates without questioning the real purpose of the payments made. Chao Hick Tin JA held:

37 ... It is clear that the court will be slow to interfere with commercial decisions of directors which have been made honestly even if they turn out, on hindsight, to be financially detrimental (see *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1994] 3 SLR(R) 1064 ('*Intraco* (CA)') at [30]). As stated by Lord Greene MR in *Re Smith & Fawcett Ltd* [1942] Ch 304 *at 306, directors 'must exercise their discretion* bona fide in what they consider — not what a court may consider — is in the interests of the company'. It is therefore 'theoretically possible for a board of directors to make a decision which is commercially ludicrous and yet act perfectly honestly' (see Walter Woon on *Company Law* (Tan Cheng Han SC gen ed) (Sweet & Maxwell,

Revised 3rd Ed, 2009) at para 8.36) ('Walter Woon')

38 However, this does not mean that the court should refrain from exercising any supervision over directors as long as they claim to be genuinely acting to promote the company's interests. First, 'where the transaction is not objectively in the company's interests, a judge may very well draw an inference that the directors were not acting honestly': see *Walter Woon* at para 8.36. The test in *Charterbridge Corporation Ltd v Lloyds Bank Ltd and another* [1970] 1 Ch 62 (at 74) of 'whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company', has been accepted and applied by this court in Intraco (CA) *(at [28]). On the other hand, it will be difficult to find that a director has acted* bona fide *in the interests of the company if he 'take[s] risks which no director could honestly believe to be taken in the interests of the company': Cheam Tat Pang and another v Public Prosecutor* [1996] 1 SLR(R) 161 at [80] ('Cheam Tat Pang').

39 Secondly, it seems that the requirement of bona fide *or honesty will not be satisfied if the director acted* dishonestly even if for the purported aim of maximising profits for the company. In *Vita Health Laboratories Pte Ltd and others v Pang Meng Seng* [2004] 4 SLR(R) 162 ('Vita Health'), the plaintiff companies claimed that the defendant director had breached his duties by, inter alia, creating false and unrecoverable receivables purportedly due from third parties so as to create an illusion that the company was successful and profitable. While the court acknowledged the sanctity of business judgment, it made clear that immunity from suit for poor commercial decisions was meant to protect '[b]ona fide entrepreneurs and honest commercial men [who] should not fear that business failure entails legal liability', and to encourage commercial risk and entrepreneurship (*Vita Health* at [17]). On the other hand (*Vita Health* at [19]):

> A director who causes accounts to be misstated, flagrantly abuses his position and breaches his corporate duties. Being in breach of his duties to the very company itself, he cannot evade his responsibility by attempting to hide behind the cloak of corporate immunity. Apart from this, he may also face issues of liability and or indemnities apropos his fellow directors, shareholders, auditors and third parties. In appropriate cases, the cloak of corporate immunity will be readily lifted by the court. Creative accounting of a deceitful nature ought to be severely denounced as it strikes at the very heart of commercial intercourse which depends upon the integrity of company accounts and financial statements.

[44] In our view, it does not lie in the mouth of a man who was the CEO of the company to deflect his duty to exercise reasonable diligence by arguing that he was simply following what was told to him by subordinate officers of the company to be an established practice, especially in relation to a payment of the kind such as the present which is prima facie improper and indeed illegal.

Statutory duties under the Companies Act 1965

[34] I also reproduce the relevant provisos under the then-applicable s 132 of the Companies Act 1965:

(1) A director of a company shall at all times exercise his powers for a proper purpose and in good faith in the best interest of the company.

(1A) A director of a company shall exercise reasonable care, skill and diligence with —

(a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and

(b) any additional knowledge, skill and experience which the director in fact has.

Business judgment

(1B) A director who makes a business judgment is deemed to meet the requirements of the duty under subsection (1A) and the equivalent duties under the common law and in equity if the director —

(a) makes the business judgment in good faith for a proper purpose;

(b) does not have a material personal interest in the subject matter of the business judgment;

(c) is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and

(d) reasonably believes that the business judgment is in the best interest of the company.

Reliance on information provided by others

(1C) A director, in exercising his duties as a director may rely on information, professional or expert advice, opinions, reports or statements including financial statements and other financial data, prepared, presented or made by —

(a) any officer of the company whom the director believes on reasonable grounds to be reliable and competent in relation to matters concerned;

(b) any other person retained by the company as to matters involving skills or expertise in relation to matters that the director believes on reasonable grounds to be within the person's professional or expert competence;

(c) another director in relation to matters within the director's authority; or

(d) any committee to the board of directors on which the director did not serve in relation to matters within the committee's authority.

(1D) The director's reliance made under subsection

(1C) is deemed to be made on reasonable grounds if it was made

(a) in good faith; and

(b) after making an independent assessment of the information or advice, opinions, reports or statements, including financial statements and other financial data, having regard to the director's knowledge of the company and the complexity of the structure and operation of the company.

[35] Concerning these statutory duties, it would be remiss of me not to refer to the decision of Nalini Pathmanathan J in *Petra Perdana Berhad v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & Ors* [2014] MLJU 267; [2014] CLJU 236 where she held:

> [212] In *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and Other Appeals* [2012] 3 MLJ 616 at 654; [2012] 5 CLJ 169; [2012] 4 MLRA 210 the Court of Appeal held that ss 132(1) and 132(1A) do not alter the law in this area but enhance the common law duty of care and equitable fiduciary duties. At para 233, p 654 this is what the court said:
>
> > ... The prior provision of s 132(1) requires a director to act honestly. The current s 132(1) *of the Act,* requires a director to act in good faith in the best interests of the company. It is accepted that for all intents and purposes, the scope of the directors' duties to act honestly under the old s 132(1) and the new s 132(1) are the same. Thus, the old case law relating to the duty to act honestly continues to be relevant (see *Cheam Tat Pang v. Public Prosecutor* [1996] 1 SLR 541). It is also recognised that the duty to act in the best interests of the company means different things, depending on the factual circumstances.
>
> [213] And the test to be adopted in determining whether there was a breach of such statutory duty was defined as follows at para 238 at p 655:
>
> > [238] ... The test is nicely condensed in *Ford's Principles of Corporations Law* (para 8.060), that there will be a breach of duty if the act or decision is shown to be *one which no reasonable board could consider to be within the interest of the company.*
>
> [239] This test is adopted in *Charterbridge Corpn Ltd v Lloyds Bank Ltd* [1970] Ch 62 at p 74, in that, to challenge a decision of the directors the test is whether:
>
> > > ... an intelligent and honest man in the position of the director of the company concerned, could in the whole of the existing circumstances have reasonably believed that the transactions were for the benefit of the company.
>
> [240] The above principle is often referred to as the 'Charterbridge Principle'.
>
> ...
>
> [242] It is important to note, following high authority, such as *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, *that the court does not substitute its own decision with that of the directors*, since the decision of the directors to enter into the JDA is a management decision.
>
> [214] This encapsulates the core of the duties owed by director under statute.
>
> (Note that the above decision was affirmed by the Federal Court)

I also refer to the decision of the Court of Appeal in *Soh Chee Gee v Syn Tai Hung Trading Sdn Bhd* [2019] 2 MLJ 379 where the court found that a CEO of a company also owed fiduciary duties by virtue of his seniority and his position in the company.

Burden of proof

[36] I must also touch on the applicable principles of law concerning the burden of proof.

[37] It is trite that the burden of proof in this case lies with the plaintiff. It is for the plaintiff to prove that the defendants did breach their duties owed to the company and that the company suffered damages as a result of the actions of the defendants. This would have to be decided based on the balance of probabilities.

[38] I also note the difference between legal and evidential burden which was succinctly explained by the Court of Appeal in *Tenaga Nasional Bhd v Transformer Repairs & Services Sdn Bhd & Ors* [2024] 1 MLJ 653; [2023] 1 LNS 2310:

> [52] Section 101(1) and (2) of the EA provide for legal burden of proof while s 102 of the EA concerns evidential burden of proof. The distinction between legal and evidential burden is explained in *Lilies Suraya Abdul Latib & Ors v Khairul Sabri & Others* [2019] 1 LNS 2099; [2020] 4 AMR 365, at [17], as follows (in the context of a claim based on the tort of negligence):
>
> > [17] I am of the following view:
> >
> > (1) the plaintiffs have the legal burden under s 101(1) and (2) EA to prove on a balance of probabilities that the defendants are negligent regarding the Incident (Legal Burden). This Legal Burden rests on the plaintiffs throughout the trial and does not shift to the defendants at any time — please refer to *Letchumanan Chettiar Alagappan*;
> >
> > (2) the evidential burden pursuant to s 102 of the EA (Evidential Burden) lies on the plaintiffs to adduce evidence to prove a prima facie case of the defendants' negligence with regard to the Incident (prima facie case). Regarding this Evidential Burden:
> >
> > (a) in the Singapore Court of Appeal case of *Britestone Pte Ltd v Smith & Associates Far East Ltd* [2007] 4 SLR 855, at [60], VK Rajah JCA held that a prima facie case may be established by a plaintiff adducing evidence which is not 'inherently incredible';
> >
> > (b) once the plaintiffs have proven a prima facie case, the Evidential Burden shifts to the defendants to adduce rebuttal evidence that the defendants have not been negligent in respect of the Incident; and
> >
> > (3) after a trial:
> >
> > (a) the court has to decide whether there is evidence on a balance of probabilities to prove the defendants' negligence in the Incident. I refer to the definitions of 'proved' and 'disproved' in s 3 EA as follows:
> >
> > 'proved': a fact is said to be 'proved' when, after considering the matters before it,

A the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists;

'disproved': a fact is said to be 'disproved' when, after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist;

(b) if the plaintiffs have adduced sufficient evidence on a balance of probabilities to prove that the defendants have been negligent regarding the Incident, the plaintiffs have successfully discharged the Legal Burden and Evidential Burden under s 101 and 102 EA respectively to prove their claim against the defendants; and

(c) if there is no adequate evidence to prove on a balance of probabilities that the defendants have been negligent in the Incident, the plaintiffs have failed to discharge the Legal Burden and Evidential Burden. Consequently, the Original Action has to be dismissed on this ground alone.

[39] I also refer to *Dato' Mohamad bin Shahul Hameed v Datin Mazita bt Osman* [2023] 6 MLJ 544; [2023] 8 CLJ 526 where Gunalan Muniandy JCA stated:

[27] On this issue in dispute, the respondent stressed that the burden of proof lay on the appellant to prove this particular fact which the appellant asserted to be true (s 101(1) and (2), Evidence Act 1950 ('EA') referred to).

[28] In a case in point, the Court of Appeal emphasised that:

The plaintiffs who desire the court to give judgment as to their right or liability, dependent on the facts which they assert in relation to the oral contract bear the burden of proving on a balance of probabilities that they have an oral contract which is binding on the defendant (*Sang Lee Company Sdn Bhd v Suburamaniam* [2011] 1 CLJ 167; [2011] 5 MLJ 374).

Circumstantial evidence

[40] As substantial parts of the evidence relied on by the plaintiff relate to circumstantial evidence, I must also consider the applicable legal principles when dealing with such evidence and under what circumstances could this court rely on such evidence before finding liability against a defendant.

[41] It is clear to me that unlike direct evidence, which directly shows the existence of a state of facts is different from that of circumstantial evidence. Such evidence indirectly links and shows the existence of the event or fact through a series of facts or circumstances surrounding the case and entitles the

court to make certain inferences. This court must however caution oneself on the test required before any finding of liability is based on circumstantial evidence.

[42] I refer to *Mohd Imran bin Mohd Ramly & Anor v Public Prosecutor and another appeal* [2020] 6 MLJ 370; [2020] 6 CLJ 705 where Hasnah Mohammed Hashim JCA (as she then was) delivering the judgment of the Court of Appeal held:

> ... However, even in the absence of direct evidence, a conviction can be secured through circumstantial evidence (see *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; [1965] 1 LNS 171; *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306; [1982] 1 LNS 126; *Public Prosecutor v Magendran a/l Mohan* [2005] 6 MLJ 6; [2005] 3 CLJ 592). It was undisputed that the prosecution relied on circumstantial evidence and the learned trial judge had convicted the appellants based on circumstantial evidence.
>
> [24] In *Sunny Ang*'s case the deceased's body was never found. The Federal Court held:
>
> > ... The second question to which I must draw your attention is that in this case, depending as it does on circumstantial evidence, is whether the cumulative effect of all the evidence leads you to the irresistible conclusion that it was the accused who committed this crime. Or is there some reasonably possible explanation such, for example — was it accident?
> >
> > ...
> >
> > A conviction based on circumstantial evidence was good in law if the cumulative effect of all evidence lead to an irresistible conclusion that it was the accused who committed the crime. The Court of Appeal in *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22 Thomson CJ observed:
> >
> > > That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?
>
> [33] In this instant appeal we can only conclude that the cumulative effect of the evidence led to an irresistible conclusion that the first appellant had without a doubt caused the death of the deceased.

[43] I also refer to *Philip ak Uja v Public Prosecutor* [2023] 6 MLJ 866; [2023] 1 LNS 1937 where Hashim Hamzah JCA stated:

> [45] There are many authorities on how the courts should deal with circumstantial evidence in appropriate cases.

[46] We start by referring to the oft-quoted passage of Thomson CJ's (as he then was) judgment in *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22 (CA) reproduced below:

> In the first place we have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however, be borne in mind that *in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?* (Emphasis added.)

[47] Thus, in cases where the prosecution is wholly relying on circumstantial evidence to prove their case, the onus is heavy, and the evidence must point irresistibly to the conclusion of the guilt of the accused.

[48] The Federal Court in *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36; [1967] 1 LNS 18 through Pike CJ (Borneo) (as he then was) held in no uncertain terms that:

> ... The onus on the prosecution when the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it then it is not sufficient ...

[49] See also *Lim Hean Cheong v Public Prosecutor* [2012] 1 MLJ 149; [2012] 2 CLJ 1046 (CA) and *That Wei v Public Prosecutor* [2021] 6 MLJ 167; [2021] 1 LNS 1358 (CA).

[50] The essential principles relating to circumstantial evidence have been aptly encapsulated by Visu Sinnadurai J (as he then was) in P*ublic Prosecutor v Sarjit Kaur a/p Najar Singh* [1998] 1 MLJ 184; [1998] 5 CLJ 609, which has been cited with approval by the Federal Court in *Low Kian Boon & Anor v Public Prosecutor* [2010] 4 MLJ 425; [2010] 5 CLJ 489 as can be seen below:

> [16] The subject of circumstantial evidence has been given detailed attention in *Public Prosecutor v Sarjit Kaur a/p Najar Singh* [1998] 1 MLJ 184; [1998] 5 CLJ 609. in the judgment of Visu Sinnadurai J (as he then was), I find the following relevant:
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> Law on circumstantial evidence
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> *Circumstantial evidence is evidence of circumstances surrounding an event or offence from which a fact in issue may be inferred. Some examples of circumstantial evidence are: (a) motive; (b) acts preparatory to the commission of the offence; (c) fingerprints; (d) possession of stolen goods; and (e) presumptions of fact.*
>
> The law on circumstantial evidence is stated by the learned editors of *Blackstone's Criminal Practice* 1991 at pp 1674–1675 as follows:
>
> Circumstantial evidence is to be contrasted with direct evidence. Direct evidence is evidence of facts in issue, in the case of testimonial evidence, it is evidence about facts in issue of which the witness claims to have personal knowledge, for

example, '1 saw the accused strike the victim'. *Circumstantial evidence is evidence of relevant facts, ie facts from which the existence or non-existence of facts in issue may be inferred, it does not necessarily follow that the weight to be attached to circumstantial evidence will be less than that to be attached to direct evidence*. For example, the tribunal of fact is likely to attach more weight to a variety of individual items of circumstantial evidence, all of which lead to the same conclusion, than to direct evidence to the contrary coming from witnesses lacking in credibility.

The learned editors point out further:

Circumstantial evidence 'works by cumulatively, in geometrical progression, eliminating other possibilities' (*Director of Public Prosecutions v Kilbourne* [1973] AC 729 per Lord Simon at p 758). Pollock CB, likening circumstantial evidence to a rope comprised of several cords, said:

'One strand of the cord might be insufficient to sustain the weight, but three stranded together maybe quite of sufficient strength.'

Thus, it may be in circumstantial evidence that there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion but the whole, taken together, may create a strong conclusion of guilt, that is with as much certainty as human affairs can require or admit of (Exall (1866) 4 F&F 922 at p 929).

However, although circumstantial evidence may sometimes be conclusive, it must always be narrowly examined, if only because it may be fabricated to cast suspicion on another. For this reason, it has been said that:

It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (*Teper v The Queen* [1952] AC 480 per Lord Normand at p 489).

Nonetheless, there is no requirement, in cases in which the prosecution's case is based on circumstantial evidence, that the judge direct the jury to acquit unless they are sure that the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion (*McGreevy v Director of Public Prosecutions* [1973] 1 WLR 276).

Similar to the English position, it is also now established in Malaysia that in cases where circumstantial evidence is relied upon by the prosecution, the proper test to be applied by the judge trying a case without the jury is for the judge:

... to remember only that the prosecution need to prove its case beyond reasonable doubt, and failure by him to also say that the circumstances are not only consistent with the accused having committed the crime but also such that they are inconsistent with any other reasonable explanation, is not fatal. In other words, ... in a case depending on circumstantial evidence, it is enough if the court merely says that it is satisfied of the accused's guilt beyond reasonable doubt, without further saying that the facts proved irresistibly point to one and only one conclusion, namely the accused's guilt (per Suffian LP in *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306; [1982] 1 LNS 126 at p 310).

Similarly Mohd Azmi SCJ (as he then was) in *Ng Thian Soong v Public Prosecutor* [1990] 2 MLJ 148; [1990] 1 CLJ Rep 202 observed (at p 151 (MLJ)):

> It must be noted at this point since *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306; [1982] 1 LNS 126, the then Federal Court had applied *McGreevy v Director of Public Prosecution* [1973] 1 WLR 276, by holding that a trial judge's direction to the jury on burden of proof is the same whether the prosecution's evidence is direct or circumstantial, ie proof beyond reasonable doubt. Where the evidence is circumstantial, there is no further duty on the judge as in the past, to direct the jury that the evidence must be such as to be inconsistent with any other reasonable conclusion or hypothesis than the guilt of the accused in addition to proof beyond reasonable doubt.

His Lordship then added at p 151:

> But be that as it may, these authorities do not relieve the trial judge from the duty to make a balanced direction to the jury on other reasonable inference that could be drawn from any particular circumstantial evidence, particularly where they are equally favourable to the accused.
>
> Though some of these observations were made in cases where the trial was with a jury, they are equally applicable with the necessary modifications to a trial conducted by a judge sitting alone without a jury, as I do in the present case.

Inferences from circumstantial evidence

In determining the proper inference to be drawn from circumstantial evidence, the Supreme Court in *Ng Thian Soong v Public Prosecutor* ...:

> ... Where the strands of circumstantial evidence connecting the accused with the crime are capable of more than one inference, it is not sufficient for the trial judge merely to tabulate the indirect evidence. He must go one step further by directing the jury what other reasonable inferences could be drawn from each strand of circumstantial evidence, and leaving it to the jury to decide which inference they wish to adopt. It is only when the combined strength of these inferences accepted by the jury when twisted together is strong enough to constitute proof beyond reasonable doubt that a finding could be arrived at as to the guilt of the accused.

His Lordship then concluded (at p 150):

> Bearing in mind that unlike statutory presumption, there is no shift in the burden of proof on the prosecution where the evidence is circumstantial, it is necessary for the trial judge not to give the impression that there need only be one inference that can be drawn from every circumstantial evidence. *The principal circumstantial evidence in the present case are clearly open to more than one reasonable or plausible inference, and failure to put them squarely to the jury would in the circumstances occasion a miscarriage of justice.*

His Lordship pointed out that it was the duty of the trial judge to make a balanced consideration of other reasonable inferences that could be drawn from any particular circumstantial evidence, particularly where they were equally favourable to the accused.

Circumstantial evidence can sometimes be stronger than direct evidence as there is no possibility of it being like a witness's testimony which may be lacking in truth or accuracy In circumstantial evidence, the motives or acts speak for themselves, sometimes louder than the words of a witness, without any embellishment.

It should also be pointed out that circumstantial evidence does not depend on hypothesis, or theories, or even speculations. They must give rise to strong inferences so as to become the best evidence.

[44] I also refer to *Lim Hean Chong @ Teo Hean Chong v Public Prosecutor* [2012] 1 MLJ 149; [2012] 2 CLJ 1046, *Ng Thian Soong v Public Prosecutor* [1990] 2 MLJ 148; [1990] 1 CLJ 1107, *Nash v Volskwagen Financial Services (UK) Ltd* [2023] EWHC 2326 (KB) and *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948.

[45] It is also instructive that this court refers to *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307 where Thomson CJ held:

In the first place we have listened to a careful, accurate and detailed analysis of the evidence against the appellant. That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the convictions. That is very true. It must, however, be borne in mind that *in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?*

[46] I also refer to the recent decision of the Court of Appeal in *Philip ak Uja v Public Prosecutor* [2023] 6 MLJ 866; [2023] 1 LNS 1937 where the court held:

[50] The essential principles relating to circumstantial evidence have been aptly encapsulated by Visu Sinnadurai J (as he then was) in *Public Prosecutor v Sarjit Kaur a/p Najar Singh* [1998] 1 MLJ 184; [1998] 5 CLJ 609, which has been cited with approval by the Federal Court in *Low Kian Boon & Anor v. PP* [2010] 5 CLJ 489 *as can be seen below:*

[16] The subject of circumstantial evidence has been given detailed attention in *Public Prosecutor v Sarjit Kaur a/p Najar Singh* [1998] 1 MLJ 184; [1998] 5 CLJ 609. In the judgment of Visu Sinnadurai J (as he then was), I find the following relevant:

Law on circumstantial evidence

Circumstantial evidence is evidence of circumstances surrounding an event or offence from which a fact in issue may be inferred. Some examples of circumstantial evidence are: (a) motive; (b) acts preparatory to the commission of the offence; (c) fingerprints; (d) possession of stolen goods; and (e) presumptions of fact.

The law on circumstantial evidence is stated by the learned editors of Blackstone's Criminal Practice 1991 at pp 1674–1675 as follows:

> Circumstantial evidence is to be contrasted with direct evidence. Direct evidence is evidence of facts in issue, in the case of testimonial evidence, it is evidence about facts in issue of which the witness claims to have personal knowledge, for example, '1 saw the accused strike the victim'. *Circumstantial evidence is evidence of relevant facts, ie facts from which the existence or non-existence of facts in issue may be inferred, it does not necessarily follow that the weight to be attached to circumstantial evidence will be less than that to be attached to direct evidence.* For example, the tribunal of fact is likely to attach more weight to a variety of individual items of circumstantial evidence, all of which lead to the same conclusion, than to direct evidence to the contrary coming from witnesses lacking in credibility.

The learned editors point out further:

> *Circumstantial evidence 'works by cumulatively, in geometrical progression, eliminating other possibilities' (Director of Public Prosecutions v Kibourne* [1973] AC 729 per Lord Simon at p 758). Pollock CB, likening circumstantial evidence to a rope comprised of several cords, said:
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> *One strand of the cord might be insufficient to sustain the weight, but three stranded together maybe quite of sufficient strength.*
>
> *Thus, it may be in circumstantial evidence that there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion but the whole, taken together,* may create a strong conclusion of guilt, that is with as much certainty as human affairs can require or admit of (*Exall* (1866) 4 F&F 922 at p 929).

However, although circumstantial evidence may sometimes be conclusive, it must always be narrowly examined, if only because it may be fabricated to cast suspicion on another. For this reason, it has been said that:

> It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference (*Teper v The Queen* [1952] AC 480 per Lord Normand at p 489).
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> *Nonetheless,* there is no requirement, in cases in which the prosecution's case is based on circumstantial evidence, that the judge direct the jury to acquit unless they are sure that the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion (*McGreevy v Director of Public Prosecutions* [1973] 1 WLR 276).

Similar to the English position, it is also now established in Malaysia that in cases where circumstantial evidence is relied upon by the prosecution, the proper test to be applied by the judge trying a case without the jury is for the judge:

> *... to remember only that the prosecution need to prove its case beyond reasonable doubt, and failure by him to also say that the circumstances are not*

> *only consistent with the accused having committed the crime but also such that they are inconsistent with any other reasonable explanation, is not fatal. In other words,... in a case depending on circumstantial evidence, it is enough if the court merely says that it is satisfied of the accused's guilt beyond reasonable doubt, without further saying that the facts proved irresistibly point to one and only one conclusion, namely the accused's guilt* (per Suffian LP in *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306; [1982] 1 LNS 126 at p 310).

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Similarly Mohd Azmi SCJ (as he then was) in *Ng Thian Soong v Public Prosecutor* [1990] 2 MLJ 148; [1990] 1 CLJ 1107 observed (at p 151):

It must be noted at this point since *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 306; [1982] 1 LNS 126, the then Federal Court had applied *McGreevy v Director of Public Prosecution* [1973] 1 WLR 276, by holding that a trial judge's direction to the jury on burden of proof is the same whether the prosecution's evidence is direct or circumstantial, ie proof beyond reasonable doubt. *Where the evidence is circumstantial, there is no further duty on the judge as in the past, to direct the jury that the evidence must be such as to be inconsistent with any other reasonable conclusion or hypothesis than the guilt of the accused in addition to proof beyond reasonable doubt.*

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Bearing in mind that unlike statutory presumption, there is no shift in the burden of proof on the prosecution where the evidence is circumstantial, it is necessary for the trial judge not to give the impression that there need only be one inference that can be drawn from every circumstantial evidence. The principal circumstantial evidence in the present case are clearly open to more than one reasonable or plausible inference, and failure to put them squarely to the jury would in the circumstances occasion a miscarriage of justice.

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Circumstantial evidence can sometimes be stronger than direct evidence as there is no possibility of it being like a witness's testimony which may be lacking in truth or accuracy In circumstantial evidence, the motives or acts speak for themselves, sometimes louder than the words of a witness, without any embellishment.

It should also be pointed out that circumstantial evidence does not depend on hypothesis, or theories, or even speculations. They must give rise to strong inferences so as to become the best evidence.

[47] Reliance on circumstantial evidence is not restricted to criminal cases only. This is often relied on in cases of insider trading commenced by the Securities Commission under s 200 of the Capital Markets and Services Act 2007.

[48] An example of this can be seen in *Suruhanjaya Sekuriti Malaysia v Lim Kok Boon & Anor* [2019] MLJU 937; [2019] 1 LNS 1269 where Azizul Azmi Adnan J (as he then was) stated:

> [33] Mr Thiru likened — mistakenly in my view — the mens rea for insider trading to the mens rea for fraud. It is well established that even fraud may be established through circumstantial evidence. If authority is needed for this proposition, see the decision of the Federal Court in *Mahesan v Malaysian Government Officers Co-operative Housing Society Ltd*. Indeed, in far as the mens rea for fraud is concerned, it would be unlikely that a person who alleges fraud would be in possession of direct evidence establishing the fraudulent intent of the defendant. Instead, evidence of intention must be inferred from surrounding circumstances, including the objective facts of the case and whatever contemporaneous documentary evidence there may be.
>
> [34] Now, if even in cases involving fraud or conspiracy the requisite mental element may be proved by way of circumstantial evidence, it follows a fortiori that in casesrequiring a lower standard of mental culpability — such as in the case of insider trading — proof by way of circumstantial evidence may equally suffice.

[49] I also refer to the decision of the Court of Appeal in *Pan Malaysian Pools Sdn Bhd v Kwan Tat Thai & Anor and other appeals* [2018] 4 MLJ 461; [2018] 4 CLJ 323 where the Court of Appeal allowed the claimant's appeal after it considered the various circumstantial evidence when viewed collectively, pointed to the irresistible conclusion that the defendants/respondents were liable for the claim for secret profits based on a claim for breach of fiduciary duties.

[50] It is also instructive that I refer to Commonwealth decisions on the issue of circumstantial evidence. I refer to the judgment of Pollock CB in *R v Exall & Others* (1866) 176 ER 850. where he stated:

> It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence is a link in the chain, but that is not so, for then, if any one link breaks, the chain would fail. It is more like the case of a rope comprised of several cords. One strand of cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence — there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.

[51] I further refer to the decision of the High Court of Australia in *Chamberlain v The Queen (No 2)* [1984] HCA 7:

> Mason J:
>
> > It follows from what we have said that the jury should decide whether they accept the evidence of a particular fact, not by considering the evidence directly relating to that fact in isolation, *but in the light of the whole evidence, and that they can draw an inference of guilt from a combination of facts, none of which viewed alone would support that inference. Nevertheless, the jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt. When the evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; in a civil case the circumstances must raise a more probable inference in favour of what is alleged*, and in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence ...

E. TRIAL

[52] This claim was heard for 29 days. The following witnesses were produced by the litigants:

(a) PW1 (Madam Koo Shuang Yen);

(b) PW2 (Pn Shaniza Anom bt Elias);

(c) PW3 (Pn Zalily bt Mohamed Zaman Khan);

(d) PW4 (Mr Chong Tuck Choi);
(e) PW5 (Mr Khoo Phoh Wai);
(f) PW6 (Pn Zuraida bt Ariffin);
(g) PW7 (Pn Shamsinah bt Ramli);
(h) PW8 (Mr Foo Gee Jen);
(i) PW9 (Datuk Dr Salmiah bt Ahmad);
(j) PW10 (Dato' Mohamed Suffian bin Awang);
(k) PW11 (En Kamsani bin Kambari);
(l) PW12 (En Mohd Majid bin Md Yahaya);
(m) PW13 (En Abdul Razak bin Ali);
(n) PW14 (En Mohd Zaidi bin Abdul Latif);
(o) PW15 (En Mohd Roslim bin Ab Rahman);
(p) PW16 (En Abdul Razak bin Yunus);
(q) PW17 (En Mohd Fazli bin Hamis @ Samsu);
(r) PW18 (En Abd Rahim bin Mat Rejab);
(s) PW19 (En Mohamad Shawal bin Yahya);
(t) PW20 (En Rosli bin Selamat);
(u) PW21 (Pm Nor Azira Abu Bakar);
(v) PW22 (Pn Noor Zila bin Abdul Ghani);
(w) PW23 (En Sanjay Sidhu);
(x) DW1 (En Mazuan bin Mooajam);
(y) DW2 (En Mohd Zurairi bin Mustafa);
(z) DW3 (Datuk Bakar bin Isa Ramat);
(aa) DW4 (Datuk Omar Salim);
(ab) DW5 (Tan Sri Mohd Isa bin Abdul Samad);
(ac) DW6 (Tan Sri Sulaiman Mahbob); and
(ad) DW7 (Dato' Emir Mavani).

F. APPLYING THE LAW TO THE FACTS — DECISION ON THE MERITS OF THE CLAIM AGAINST THE DEFENDANTS

[53] I now turn to the facts in this case to address the issue of whether the plaintiff has proven his case against the defendants.

(F1.) Finding 1 — That the plaintiff has failed to prove that the defendants had wrongfully caused the plaintiff to acquire the Troika units in breach of their duties owed to the company. The Board of Directors had approved the purchase of the Troika units, and this resolution remains a valid resolution

(i) Sub-issue 1 — Whether it is necessary to present to the Investment Committee

[54] Firstly, I agree with the plaintiff that the purchase of the Troika units should have been considered by the investment committee before the said proposal was put to the Board of Directors.

[55] This is in accordance with the plaintiff's Discretionary Authority Limit which states that for any investment to be undertaken by the plaintiff, such proposals that are above RM5m must be reviewed and recommended by the investment committee before any deliberation by the Board of Directors. This appears in Schedule 9 of the Discretionary Authority Limit ('DAL').

[56] I do note that the defendants contend that such a decision need not be put before the Investment Committee as seen in the witness statements of the defendants, its former head of legal, and former directors that were called to give evidence on this issue.

[57] All of these witnesses contend that the Schedule 1 would be applicable as the decision to acquire the Troika apartments does not fall under Schedule 9, but it is an acquisition of a fixed asset and not a business. All of these witnesses contend that Schedule 9 will only be applicable in situations where there is either an acquisition of land or building for expansion of any business or an investment that either: (a) acquires a company or assets through mergers and/or joint ventures; (b) acquisition of existing businesses; and (c) a new business.

[58] I do not agree with the said interpretation suggested by the defendants. I find that the purchase of the Troika units are investments as seen in the Board of Directors resolution dated 23 June 2014 which indicates that the acquisition of the Troika units were investments undertaken by the plaintiff. I reproduce parts of the Board of Directors paper dated 23 June 2014:

A 'The acquisition would be a good investment to be considered as it enables FGV to participate in long term value appreciation within the vicinity of KLCC.' The same words appear in the paper presented to the Board of Directors dated 23 June 2014.

B **[59]** This is also consistent with the email issued by the then Chief Financial Officer of the plaintiff, Ahmad Tifli bin Mohd Talha dated 18 June 2014 issued to the second defendant where he states:

> However as I noted below, the paper should normally be presented to the Investment Committee first before going to the full board. Since the Board is still the final authority, the paper can be presented direct if the Board so agrees.
>
> C
>
> I was targeting to present in the next investment committee on 24th. However I presume you want it to go direct to BD.

D **[60]** I also refer to the email dated 16 June 2014 issued by Ahmad Tifli to Rasydan bin Alias Mohamed, to prepare a paper to be presented to the Investment Committee concerning the acquisition of the Troika units. I reproduced parts of the email issued by Ahmad Tifli:

> E I am forwarding to you some documents related to two condos which Tan Sri Chairman and Dr Emir have agreed for FGVH to procure. I seek your help to draw up the Investment Committee paper, after that approved, the BOD paper, for approval of the same.

F **[61]** This requirement was also seen in the paper presented and approved by the Investment Committee as well as the Board of Directors concerning the purchase of the Battersea apartments dated 8 February 2013. The acquisition of the said Battersea apartments had to be approved through the investment committee before it was brought to the attention of the Board of Directors of the plaintiff.

G

(Note: To be clear, I have also considered the plaintiff's Board Charter, the plaintiff's Code of Ethics and Conduct as well as the plaintiff's Entitlement Policy for the purposes of this trial).

H

(ii) Sub-issue 2 — Whether the evidence shows any wrong done by the defendants — the Board of Directors approved the transaction

I **[62]** Nonetheless, despite the said shortcoming, I find that the acquisition of the Troika units was undertaken with the express approval of the Board of Directors. This decision by the Board of Directors remains valid and has not been challenged by the plaintiff. This is not the case pleaded by the plaintiff. The plaintiff must therefore accept that the said resolution dated 23 June 2014 remains a valid and binding instrument.

[63] In this case, it is irrefutable that members of the investment committee are also members of the Board of Directors. These are the individuals who would consider any proposal that would have been put up before the investment committee. Failure to comply with this internal process does not automatically mean that the whole Board of Directors' resolution is wrong or invalid. The fact that the plaintiff does not challenge the said resolution as being valid suggests that the failure to refer the matter to the investment committee does not mean that this court should impose any liability against the defendants. See *In re Duomatic Ltd* [1969] 2 Ch 365, *Re Torvale Group Ltd* [1999] 2 BCLC 605, *Ever-Yield Sdn Bhd v Yap Keat Choon and other appeals* [2023] 2 MLJ 90; [2023] 1 CLJ 345 and *Quemax Sealing (M) Sdn Bhd v Norita bt Anis & Anor* [2022] MLJU 3560; [2022] CLJU 3276.

(iii) Sub-issue 3 — No evidence of first defendant involved in the preparation of the board paper — only second defendant and the senior management were involved

[64] Firstly, I find that the allegations concerning the decision to put the proposal to purchase the property directly to the Board of Directors, how it was undertaken, the lack of valuation report or analysis as to its business purpose or future market value cannot be attributed to the first defendant.

[65] This is the decision of the second defendant and the management of the company. The emails produced by the plaintiff only show that the discussions relating to the preparation of the board paper were only between the management and the second defendant. There is no evidence, either direct or circumstantial, that this was instigated by the first defendant or that the first defendant was involved.

[66] Concerning the second defendant, I agree that he was involved and ultimately responsible for the decisions of management and any paper to be presented to the Board of Directors. However, as the decision to purchase was approved by the said board on 23 June 2014, the plaintiff cannot attribute liability for the decision to purchase the property to be that of the second defendant alone. This was a collective decision by the Board of Directors made after the recommendation contained in the said paper was presented and deliberated.

[67] Therefore, I find that no liability should be imposed on the second defendant for the purchase of the condominiums. He was authorised by the board of directors to purchase the property. Note that this does not absolve the defendants for the other claims relating to the two units.

(iv) Sub-issue 4 — The circumstantial evidence produced is not sufficiently strong to prove liability against the defendants

[68] I note that the plaintiff contends that it has produced evidence to suggest that the acquisition was moved for the wrong purpose, and this was not disclosed to the Directors by the defendants. Counsel for the plaintiff also suggests that the purpose of the Troika acquisition was predicated by the defendants' intention that the unit was purchased to enable the defendants to use the said premises. This was allegedly not disclosed by the said defendants, especially the second defendant, to the plaintiff's Board of Directors.

[69] The plaintiff refers to the following allegations that it says proves the claim against the defendants:

(a) the purchase of the acquisition did not follow the internal processes of the plaintiff — the investment committee was not referred;

(b) the second defendant had ignored Ahmad Tifli's suggestion to refer the matter to the investment committee;

(c) the purchase of the acquisition was allegedly rushed. The paper was prepared five days before the Board of Directors' meeting dated 23 June 2014;

(d) that the purchase was undertaken without a valuation report and allegedly this could have been undertaken at a lower price;

(e) there was no proper business report presented to the Board for discussion as to the reasons for the said purchase. There was no analysis of the business purpose as well as no analysis of the future market value or current market value of the property;

(f) that the first defendant was indirectly involved in the purchase of the Troika units through Turris Link Sdn Bhd;

(g) that the defendants' wives or family members were involved in the furnishing work of the unit after the finalisation of the sale and purchase and vacant possession of Troika units;

(h) that the defendants did stay at the said units and did not disclose this fact to the Board of Directors; and

(i) that the defendants used the said units contrary to the purpose of purchase as presented in the paper prepared by the second defendant and the management of the plaintiff at the material time.

[70] I find that the collective strength of this evidence does not move the scale of justice in the plaintiff's favour. The Board of Directors resolution dated 23 June 2014 shows that the said decision to purchase was duly authorised.

[71] As shown in the cases identified by me earlier, it must be shown by the plaintiff that the circumstantial evidence, when considered as a whole, is sufficient to enable this court to raise a more probable inference in its favour that the defendants are liable for breach of their duties against the company. When I consider the evidence presented as a whole, it cannot be said that the combined strength of the strands of evidence relied on by the plaintiff is sufficiently strong to withstand the sharp blade presented by the defendant in the form of the Board of Directors' resolution authorising the purchase of the said condominiums.

[72] I also find that the weight of the Board of Directors of Resolution authorising the purchase shifts the scale of justice heavily in favour of the defendants even after I take into account the circumstantial evidence relied on by the plaintiff. It is irrefutable that the purchase of the condominium was duly authorised by the Board of Directors and the defendants cannot be blamed for the said decision.

(v) Sub-issue 5 — The Board Paper was allegedly rushed, poor business plan, and had no valuation report

[73] I nonetheless agree that: (a) how the said purchase was undertaken; (b) the time taken to prepare the board paper; (c) the lack of any valuation report and no business plan or purpose of acquisition; as well as (d) the involvement of the defendants' wives and family members in furnishing decisions of the said units are suspicious. Nevertheless, after considering the evidence presented as a whole, I find that the plaintiff is still bound by the decision of the Board of Directors.

[74] At best these raise suspicion, but when they are considered collectively, I find that they are insufficient to prove the plaintiff's claim against the defendants.

(vi) Sub-issue 6 — Cannot find liability merely based on guilt by association

[75] I am also not convinced that the first defendant is guilty by the fact that he knew or may have known the individuals behind Turris Link Sdn Bhd ie Mohd Tariq bin Zakaria and Mohd Zurairi bin Mustafa. This court cannot find liability merely based on association alone. I agree that the first defendant may have known the directors and shareholders of Turris Link Sdn Bhd through his son.

(vii) Sub-issue 7 — Turris Link did not seal the deal — the sale was undertaken with the realtors as agents of the registered proprietor

[76] In addition to be above, I also find that the relationship that the first defendant may have with Turris Link did not cause the purchase.

[77] I am aware that the plaintiff suggests that it was the first defendant who wanted the said Troika units to be purchased. The plaintiff points to among others his alleged involvement through Turris Link Sdn Bhd ie Mohd Tariq bin Zakaria and Mohd Zurairi bin Mustafa and the oral testimony of the witnesses called who said that they were told that the properties were purchased to be utilised for the first defendant's use. The plaintiff also refers to the conduct of the first defendant's wife when she was involved when the units were delivered and the decision to furnish the property.

[78] However, the eventual transaction was undertaken solely with the realtors and there is no evidence that Turris Link was ultimately used as an intermediary to purchase the property. I agree that Turris Link was initially involved but even then, the company's link with the first defendant is very tenuous. At most one of the persons linked with Turris Link only received a referral fee of RM10,000. Even this payment could not be linked to the first defendant.

[79] Therefore, I cannot find that the first defendant had instigated the purchase of the Troika units. The evidence on this issue raises questions but that does not tilt the balance in favour of the plaintiff. Suspicion is not enough to find liability against the first defendant.

[80] As I said earlier, the evidence relied on by the plaintiff is merely circumstantial. The weight of all the evidence and arguments put to this court does not tilt the scale in the plaintiff's favour. Also, I repeat that I find that the first defendant was not involved in the preparation of the board paper and the initial decision to suggest the purchase of the property.

(viii) Sub-issue 8 — Evidence shows that price was based on arm length — no evidence of secret profits or that the price was instigated by the defendants

[81] On the issue of the price of the property. I accept that the valuation report does suggest that the market price of the Troika units may have been lower compared to the purchase price paid by the plaintiff at the material time. This could be seen from the evidence of Foo Gee Jee, the Managing Director of CH William Talhar & Wong Sdn Bhd.

[82] On this issue, I find that the implementation of the decision made by

the Board did not involve the first defendant. The plaintiff could only prove that the implementation of the said decision was undertaken under the control of the second defendant, as the CEO of the plaintiff at the material time.

[83] Nonetheless, I do not find evidence that the said transaction was not undertaken on an arm's length basis. The evidence of Khoo Poh Wai and Chong Tuck Choi, representatives of Concept Property Agency indicates that there was nothing wrong with the transaction.

[84] The said property agents were acting for Charles Eric Jobson, who was the owner of the units. There is no evidence that the purchase price was dictated by the defendants or by any of their representatives or agents. There is also no evidence that the purchase price was inflated to benefit the defendants or their nominees or proxies. The plaintiff had also failed to show that the owner, Charles Eric Jobson, would have agreed to a lower price for the said units. There is also no evidence of any secret profit that was made by the defendants from the said transaction.

[85] I also note that the purchase price of the property was undertaken within the mandate given by the Board of Directors. This may have been a high price but as I said, that only shows that the second defendant and his subordinates may have poor business judgment and entered into a bad bargain.

[86] This does not mean that the defendants have breached their duties to the plaintiff. I do not believe that the decisions made by the second defendant were so wrong that no reasonable honest director could have undertaken at the material time. As I said, at best it only shows a commercially bad decision by the second defendant and the plaintiff's senior management.

[87] It is trite law that this court will not generally assess the merits of a commercial business decision unless it is shown that it was undertaken for an improper purpose. I find that the plaintiff has failed to show that the decision to purchase the property was moved for any wrong purpose as the resolution remains valid and unchallenged even today. See *Howard Smith Ltd v Ampol Petroleum Ltd and others* [1974] AC 821 and the decision of the Court of Appeal in *Soh Chee Gee v Syn Tai Hung Trading Sdn Bhd* [2019] 2 MLJ 379.

[88] I therefore do not find anything wrong with the purchase price agreed to by the plaintiff. They may have gotten the wrong end of the stick commercially. That does not mean that there is any wrong, concerning the purchase of the two condominium units, that could be attributed to the defendants. After all, the purchase of the said units was within the mandate granted by the Board of Directors. Even though the purchase price was higher than the alleged market price, this was only a business decision by the second defendant within the

authority given to him by the Board. I do not find any lack of bona fides concerning the purchase of the said units.

(ix) Sub-issue 9 — Purchase was undertaken after the Board of Directors passed a resolution to authorise the second defendant to do so — 23 June 2014

[89] At the end of the day, the purchase of the said Troika units was undertaken with the consent of the Board of Directors. I find the strains of evidential rope that are available to the plaintiff, even when they are tied together into a knot, are not strong enough to find liability against the defendants for the alleged breach of fiduciary duty relating to the issue as to the purpose of acquisition of the Troika units. I agree that the process may be faulty in some areas, but as the Board has agreed to purchase and did authorise the company to do so at the price determined, the defendants cannot be made liable for the said purchase.

[90] I also note that at no material time did the plaintiff challenge the said Board of Directors Resolution. This is crucial as it shows that the said resolution is still valid and binding on the company.

(F2) Finding 2 — No damages realised by the plaintiff for the troika units

[91] Even if I am wrong on the above, I find that the plaintiff has not shown it has suffered any loss as a result of the purchase of the Troika units.

[92] In this case, the plaintiff contends that the price paid for the units purchased was higher than the market price. The company says that the units could have been bought at a lower price. and learned counsel for the plaintiff relies on the comparable property report prepared by the valuers identified earlier.

[93] As I have stated earlier, I find a serious fallacy in the evidence of the plaintiff to justify its claim against the defendants based on the alleged market value argument stated above.

[94] The plaintiff has not shown to this court that the seller of the units, one Charles Eric Jobson, would have agreed to sell the Troika units to the plaintiff at a lower price or whether he would even consider the market value as suggested by the plaintiff's expert. The property realtors that represented Charles Eric Jobson also did not explain this during the examination-in-chief.

[95] As I have stated earlier, this court finds that the purchase was undertaken on an arm's length basis. There is not an inkling of whether the said seller would have agreed to sell the Troika units at a lower price. There was no

interference by the first and second defendants or any evidence that they fixed the price to the disadvantage of the plaintiff. A

[96] The only evidence that was produced concerns the dealings these realtors had with Turris Link Sdn Bhd ie Mohd Tariq bin Zakaria and Mohd Zurairi bin Mustafa or with the plaintiff and what occurred during the whole process. As I said earlier, these individuals may have a connection with the first defendant. He was a high-profile politician after all at the material time. Therefore, it is not surprising that, as ants to sugar, businessmen such as Mohd Tariq and Mohd Zurairi, would want to meet or have any connection with him. That does not mean that he had influenced or had any involvement in the purchase of the Troika units. B C

[97] Secondly, I do not find any element of any wrongdoing relating to the purchase of the Troika units. It would have been different if there was an element of any secret profits obtained by the defendants from the purchase of the units. The Troika units had been purchased through the realtors acting for the registered owner, Charles Eric Jobson. D

[98] Moreover, the plaintiff until today has chosen to retain the Troika units and not sell the property. Even if this court were to entertain a finding of liability for breach of fiduciary duty, I find the evidence shows that there is no realised loss from the purchase of the property that is suffered by the plaintiff. The asset remains in their possession and control. Until such time they sell it at a loss, then I cannot find any liability against the defendants. E F

[99] I refer to the decision of the House of Lords in *Target Holdings Ltd v Redferns (a firm)* [1996] 1 AC 421 which was reaffirmed by the Supreme Court of the United Kingdom in *AIB Group (UK) plc v Mark Redler & Co* [2014] UKSC 58. The issue that arose in those two cases concerns the principles that should be utilised when dealing with damages to be awarded for a breach of trust committed in a relationship of fidelity and confidence. G

[100] Lord Browne-Wilkinson in *Target Holdings* held: H

> To my mind in the case of an unimpeachable transaction this would be an unjust and surprising conclusion. *At common law there are two principles fundamental to the award of damages. First, that the defendant's wrongful act must cause the damage complained of. Second, that the plaintiff is to be put 'in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'*: *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25 per Lord Blackburn. Although, as will appear, in many ways *equity approaches liability for making good a breach of trust from a different starting point, in my judgment those two principles are applicable as much in equity as at common law. Under both systems liability is fault based: the defendant is only liable for the* I

consequences of the legal wrong he has done to the plaintiff and to make good the damage caused by such wrong. He is not responsible for damage not caused by his wrong or to pay by way of compensation more than the loss suffered from such wrong. The detailed rules of equity as to causation and the quantification of loss differ, at least ostensibly, from those applicable at common law. But the principles underlying both systems are the same. On the assumptions that had to be made in the present case until the factual issues are resolved (ie that the transaction would have gone through even if there had been no breach of trust), the result reached by the Court of Appeal does not accord with those principles. Redferns as trustees have been held liable to compensate Target for a loss caused otherwise than by the breach of trust. I approach the consideration of the relevant rules of equity with a strong predisposition against such a conclusion.

...

The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law. Thus, in relation to a traditional trust where the fund is held in trust for a number of beneficiaries having different, usually successive, equitable interests, (eg A for life with remainder to B), the right of each beneficiary is to have the whole fund vested in the trustees so as to be available to satisfy his equitable interest when, and if, it falls into possession.

Accordingly, in the case of a breach of such a trust involving the wrongful paying away of trust assets, the liability of the trustee is to restore to the trust fund, often called 'the trust estate', what ought to have been there.

The equitable rules of compensation for breach of trust have been largely developed in relation to such traditional trusts, where the only way in which all the beneficiaries' rights can be protected is to restore to the trust fund what ought to be there. In such a case the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the trust estate: see *Nocton v Lord Ashburton* [1914] AC 932, 952, 958, per Viscount Haldane LC. *If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed: Caffrey v Darby* (1801) 6 Ves 488; *Clough v Bond* (1838) 3 My and Cr 490. Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good that loss to the trust estate if. but for the breach, such loss would not have occurred: see Underhill and Hayton, *Law of Trusts and Trustees* (14th Ed) (1987) pp 734–736; *In re Dawson decd*; *Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSWR 211*; Parker v Tucker (No 2)* [2010] FCA 624. *Thus the common law rules of remoteness of damage and causation do not apply. However there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable viz. the fact that the loss would not have occurred but for the breach*: see also I*n re Miller's Deed Trusts* (1978) 75 LSG 454; *Nestle v National Westminster Bank Plc* [1993] 1 WLR 1260.

[101] I also refer to the decision of PS Gill J in *Maraputra v Kumagai* [1999] MLJU 679; [2000] 2 CLJ 311 where he stated:

In assessing equitable compensation, the court is allowed a much more flexible approach, and is not 'straight jacketed' to the same extent as it would be in assessing common law damages.

The flexibility of the approach can be seen inter alia from the following passages in well known authorities.

In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach, ie, the plaintiff's loss of opportunity. The plaintiff's loss as a result of the breach is to be assessed with the full benefit of hindsight.

Foreseeability is not a concern in assessing compensation but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach' and as stated in the case of *Target Holdings Ltd v Redferns* [1996] 1 AC 421 at 438A per Lord Browne-Wilkinson:

The obligation imposed by courts of equity upon defaulting trustees and the fiduciaries is of a more absolute nature than the common law obligation to pay damages for tort or breach of contract.

It follows that the obligation is not limited or influenced by common law principles governing remoteness of damage, foreseeability or causation.

[102] I also refer to *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 1 CLJ 133, *Voo Nyuk Fah @ Peter & Anor v Lam Yat Kheong & Anor* [2012] MLJU 159; [2015] 5 CLJ 229, *Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd* [2016] 3 MLJ 708, *Bekalan Sains P & C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1; [2011] CLJU 232 and *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777.

[103] As I have said earlier, I find that the said sale and purchase of the properties was undertaken on an arm's length basis. Therefore, it cannot be said that the price paid was wrong. It may have been at a higher market value compared to what the valuer opined based on the comparison chosen by him, but this does not mean that the defendants should be liable for the price paid for the property. After all, the price paid is within the mandate agreed to by the Board of Directors.

[104] In the circumstances, I opine that the plaintiff has not proven this limb of its claim against the defendants.

(F3) Finding 3 — That the defendants did unlawfully use the said Troika units and did not disclose to the Board of Directors that they were using the said Troika units

[105] I will now deal with the issue of whether the defendants had lawfully used the said Troika units.

(i) Sub-issue 1 — First defendant admitted he used the unit but alleges that he was authorised to utilise the unit

[106] In this case, the first defendant contends that after the management had received the delivery of the unit, he was told by the second defendant that he was entitled to use it. The first defendant relies on the evidence of the former legal head of the plaintiff, who suggests that the plaintiff's Executive Committee, headed by the second defendant had deliberated and agreed to allow the first defendant to utilise the said unit.

[107] This allegation was not agreed to by the plaintiff. The second defendant suggests that he had allowed the use of the unit to save the costs incurred by the plaintiff as they have been paying monthly hotel charges that were incurred by the first defendant as part of his entitlement as the then Chairman.

[108] I find the argument put forth by the defendants on this issue wrong and I therefore reject the same.

[109] Firstly, if indeed there was such a decision by the Exco or senior management of the plaintiff that the Troika unit could be used by the first defendant, then this must have been recorded in a minute of meetings of the said committee or a board paper or even an email shared between the first defendant to the second defendant or vice versa or at least an email between the legal head with the second defendant.

[110] The reason I say that is because the specific purpose of purchasing the Troika units approved by the Board was to enable it to be used by the guests or overseas business clients of the company. This change of use would be contrary to what was decided by the Board of Directors.

[111] Therefore, if this were true, surely the defendants would have been aware that there would be a need to have this change of use referred to the Board of Directors and alert the said body of the need to have a new resolution passed to affirm the decision to allow the first defendant to reside at the said premises. This was never done by the defendants in any form whatsoever.

[112] I therefore reject the contentions raised by the first defendant's witnesses who suggest that the first defendant was allowed to reside at the said premises by senior management of the company. This goes against the mandate of the Board of Directors passed on 23 June 2014. The plaintiff's Board of Directors is only entitled to: (a) directors fees; (b) meeting allowance; and (c) other allowances, such as car travel allowance, subsistence allowance, hotel allowance, and medical allowance. I also note that the hotel allowance is only claimable if the directors are attending official functions on behalf of the company and not otherwise. There is also no such right given to the first and second defendants, to have their stay at the said premises paid and covered by the plaintiff in their contract of employment or letter of employment.

[113] As I have said above, under the terms of the plaintiff's Board Remuneration policy the first defendant, as Chairman of the company, is only entitled to claim any hotel charges he incurs caused by the attendance of any official meetings on behalf of the Company. He is not entitled to be reimbursed on a monthly or annual basis for any room or hotel charges whilst he remains as a director or Chairman of the plaintiff. His right to be reimbursed for the said charges is subject to the need to attend any official meetings as Chairman of the plaintiff.

[114] I am aware that the first defendant relies on the PNB hotel charges that he had incurred and paid allegedly by the plaintiff in the past. This is challenged by the plaintiff. Even if I were to accept the said contention, I still find that even those hotel charges were wrongly claimed against the plaintiff. The first defendant is not an executive director of the plaintiff and surely did not have official meetings attended on behalf of the plaintiff daily. I cannot accept that he is entitled to claim hotel charges for the whole calendar month, even Saturdays and Sundays when no such event is shown to have been scheduled. Even the witnesses produced by the said defendant, confirm that he did not attend meetings every day for the company.

[115] Even if I were to accept the arguments by the defendants, the alleged fact that these hotel charges may have been approved does not mean that he was entitled to use the said Troika units. The use is contrary to the resolution of the Board of Directors. As Chairman, he is aware and should have informed the Board and ensured that the said use was approved by the Board. The continued use is also contrary to the Internal Ethics rules that were laid down by the company binding on all directors. For the first defendant to claim he has been authorised, it would require that he takes steps to ensure that the said use is recorded and confirmed by the Board of Directors.

[116] I have also considered the Annual Reports for the years 2013 and 2014 produced before me that show the number of meetings attended by the first

defendant and the allowances claimed by the first defendant relating to the affairs of the plaintiff. The reports do not indicate that he had daily meetings as suggested by the defendants' witnesses and did not justify the charges incurred as claimed concerning the hotel charges as well as the right to reside at the Troika unit.

[117] I reiterate my finding that as Chairman of the plaintiff, he is aware that any decision to have him reside at the said premises must first be approved by the Board of Directors. He cannot feign ignorance as he was aware of the Board of Directors resolution dated 23 June 2014. He should have then alerted the Board of the second defendant's decision or proposal and have this deliberated. Even if I were to accept his contention, he cannot close an eye to this fact and follow the wrong decision undertaken by the second defendant.

[118] I also note that the first defendant suggests that the other members of the board were aware that he was residing in the Troika unit. I do not find that to be credible and reject the same. If this is true, I see no reason why this issue was not raised at any Board of Directors meeting. Surely, if this is correct, there is nothing wrong for him to have this recorded and passed and recorded by the same board of directors. The Code of Ethics of the plaintiff clearly states that the Board members cannot use company assets unless they are authorised by the Board and may only be used for official purposes and not for any personal reasons.

[119] Furthermore, assuming I am wrong on the above, the mere fact that some of the members of the Board of Directors (Omar Salim and Sulaiman Mahbob) may have known he stayed at the unit, does not mean that the said use was authorised. The use of the said unit should have been raised in the plaintiff's remuneration committee and eventually considered by the Board of Directors. This was not done. The purchase was intended to enable the units to be used for guests of the company and not by the Chairman. The first defendant, being the Chairman of the company, is aware of the resolution and should have taken steps to ensure that his use was duly known and authorised. The first defendant also contends that the silence of the employees such as PW11 (Kamsani), Najid (PW12), and Abu Bakar (DW2) justifies the said use of the unit. I cannot accept that argument. The approval must still be obtained from the Board. He should have disclosed this and obtained express acquiescence from the Board and the Remuneration Committee. This would then be recorded as part of his remuneration paid by the company.

[120] I also find liability on the first defendant on the grounds that the use of the Troika unit or even the earlier referred hotel charges were not approved by the Remuneration Committee. There is no evidence presented by the first defendant to show that the use of the Troika units was referred to and approved

by the Remuneration Committee. The recommendation made by the Remuneration Committee of the plaintiff must be approved for any salary, benefits, or any allowance of either Executive or Non-Executive Directors. As I said, this would have to be eventually approved by the Board of Directors.

[121] In this case, the use of the said Troika units was not approved by the Remuneration Committee and not approved by the Board of Directors. Therefore, I cannot find that the said unit was approved by the Board of Directors, and as such the said use by the first defendant is unlawful.

[122] I also find that 'an honest and intelligent man in the position of a director of the company concerned could, in the whole of the existing circumstances', and not 'have reasonably believed that the transaction was for the benefit of the company.' I do not believe that the first defendant had even considered whether this was in the best interests of the company. He simply chose to close his eyes to the obvious and used the said unit without the express approval of the Board of Directors.

[123] For the above reasons, I find that the first defendant had wrongly used the Troika unit and had therefore breached his fiduciary duties to the plaintiff. I do not find that a reasonable and honest director of his standing would have taken the same decision. A reasonable and honest director would have declined the said proposal or at least put the issue to be decided by the Board of Directors.

[124] I note that the defendants rely on the evidence of Abu Bakar (DW3) who states and alleges that the defendants were permitted to use the Troika units pursuant to an Exco meeting. I do not accept the said contention.

[125] Firstly, this alleged Exco meeting was not shown by any documentary evidence. If this is true surely this would have been recorded at least by an internal memo issued between the members and shared with the first defendant.

[126] Secondly, the decision to purchase and who is authorised to use the said units lies with the Board of Directors. The Exco is not entitled to change the decision of the Board. If the Exco wanted to change the resolution, they should have then raised this with the Board and let it be deliberated. This will then have to be discussed by the Remuneration Committee and the Board of Directors and eventually reported in the company papers.

[127] Without such evidence, I do not accept the defendant's contention and reject the evidence of Abu Bakar. I do not believe that he is a reliable witness on this issue.

(ii) Sub-issue 2 — Did the second defendant utilise Unit B — Troika

[128] In this case, the second defendant denies that he had utilised the Troika units. He suggests that he had no reason to stay at the said premises as his house is at Setiawangsa which is already near the office.

[129] I do not accept the said contention and I find that the plaintiff has shown that he had utilised the unit in breach of his duties to the company.

[130] It is clear that the keys to the said unit were given to the second defendant, his secretary, and he even made a copy for his wife. His wife was also involved in the decision as to how to furnish the said premises. The furniture and even carpets to be used at the said premises were chosen based on the personal choice of the second defendant and his wife. He had also personally bought utensils, and expensive cutlery to be kept at the said premises. He also admitted that his son had even used the gym and facilities at the unit.

[131] This indicates that he and his family were going to reside at the said premises and utilise the said unit. No Chief Executive Officer of any company especially those of a large publicly listed company would be interested in the furnishings and cutlery of an apartment bought to be used by the company's staff or guests unless he has a personal interest in the same. I find that a CEO would usually leave those decisions to be undertaken by his management or juniors. I also find it perplexing why his wife got involved unless they were planning to stay at the said premises. One only furnishes an apartment or any premises to one's taste unless one intends to stay at the said premises. His admission that his son had used the facility also indicates that he had enjoyed access contrary to his duties owed to the company.

[132] This is further shown by the evidence produced by the plaintiff. Key card ledgers were produced showing that the premises were utilised by the second defendant. This shows that he or his family member had utilised the said Troika unit contrary to his duties to the company. This is also seen in the evidence of PW11 (Kamsani) and Najid (PW12) who testified that:

(a) Najid's evidence (PW12):

> The 2nd defendant also informed me that he would occupy Unit B and the first defendant would occupy Unit A 228;
>
> The 2nd defendant also said that the first defendant would like to move into Unit A as soon as possible and that renovation should be done quickly

(b) Kamsani's evidence (PW11)

> Najid memaklumkan saya bahawa Defendan Pertama dan Defendan Kedua akan masing-masing menghuni di Unit A dan Unit B.

[133] The key card ledgers also showed that the key given to Datin Fadzilah was used 106 times to enter Unit B after working hours. Three additional key cards were also requested by the second defendant's secretary to be given to the other family members of the first defendant. The keys were only returned on 30 April 2016. The evidence before me also shows that Datin Fadzillah had also requested the installation of Astro decoders for Unit B. This would mean that the said Unit was used by the second defendant and his family.

[134] I also do not accept his explanation that he only got involved in the above decisions to ensure that the unit was ready to be utilised for his guest for an alleged upcoming conference or meeting of overseas business clients. I find that this is merely a ruse to deflect the reality that he had abused his power and utilised the unit. The excuse given is untrue and at best is a mere afterthought. There is no evidence of such a conference or meeting planned as suggested by the second defendant. This is a mere afterthought or mere figment of the second defendant's imagination.

[135] I also repeat my findings concerning the first defendant to be applicable against the second defendant. It is also apparent to me that the use of the said Troika units was not approved by the company. This includes the non-approval by the Remuneration Committee and the non-approval by the Board of Directors. The actions of both defendants were in breach of their fiduciary duties to the company. As the CEO of the company, the second defendant should have raised the issue of the use of the Troika units to the Board of Directors. He should have obtained approval for the said use not just for him but also for the first defendant. He had simply ignored this important step and used the said units or even allowed the use of the said units contrary to what was approved by the Board.

[136] For the above reasons, I find that the plaintiff has proven its case that the second defendant did reside at the said premises, and for the same reasons identified earlier against the first defendant, I find that the second defendant had breached his duties to the plaintiff.

[137] I find that the defendants' decision to reside at the said Troika units, is wrong and is contrary to the fiduciary duties owed by the defendants to the plaintiff. I find that 'an honest and intelligent man in the position of a director of the company concerned could, in the whole of the existing circumstances', would not 'have reasonably believed that the transaction was for the benefit of the company.'

[138] I also find that the defendants had breached their statutory duties owed to the company under s 132 of the above-referred Companies Act. The defendants should have the decision to allow them to reside on the said

premises to be deliberated by the Board of Directors. This fact should have been disclosed to the Board of Directors.

(F4) Finding 4 — That the defendants did unlawfully cause the plaintiff to incur substantial costs to furnish the Troika units contrary to their duties owed to the company

[139] In addition to the above, I also find that the defendants had wrongly caused the furnishing of the Troika units to fulfil their taste and needs.

[140] The Board of Directors had only allowed the units to be used for the guests or business associates of the plaintiff. As I have found earlier, the Board did not authorise the use of the Troika units by the defendants.

[141] Therefore, the furnishing of the units should not have been dictated by the first and second defendants, more so in accordance with the directions of their wives and family members.

[142] I also do not find any credibility in the defendants' arguments that their wives were only assisting in the furnishing activities of the plaintiff's employees. I do not accept that such decisions should be dictated by the directors' wives. This should have been undertaken independently by the employees of the plaintiff in accordance with the needs of the plaintiff's business. I find a reasonable and prudent CEO and a Chairman of a publicly listed company would not concern themselves with such exercise and would have left it to their subordinates. I can only infer that the defendants were personally invested in the said exercise by having their wives and even their in-laws involved.

[143] It is also troubling that the decision to employ Amy Karya was influenced by the first defendant's wife. I find that the plaintiff should not have allowed his sister-in-law or even his wife to partake in the activities to furnish the Troika unit. This is contrary to his fiduciary and statutory duty owed to the plaintiff. On this issue, I find that plaintiff has proven its claim that the first defendant had acted contrary to his duties owed to the company.

[144] I note that the first defendant feigns ignorance of this fact and suggests that this was done independently by the employees of the company. I do not believe the said contention and find that he would have known that his wife and sister-in-law were involved. After all, he knew that he allegedly was given the right to reside at the said premises, albeit wrongly, and would have known that his wife and sister-in-law would be participating in the furnishing process. He should have ensured that all these activities be stopped and be allowed to be undertaken independently in accordance with the internal processes of the

company. He should not have allowed himself to be put in a position of conflict. Furthermore, all these facts should have been disclosed to the Board of Directors.

[145] The same applies to the second defendant. He suggests that he had caused his wife, Datin Fadzilah, to assist due to her experience as a former secretary to an entity that was involved in the hotel industry. I do not find that explanation credible. This only shows that he was personally interested and was going to utilise the unit. He should have then disclosed this fact to the Board and had his employees decide independently as to who to appoint and what furnishings were to be utilised based on the budget allocated for the said exercise. He should not have put his interests in conflict with those of the company. He even bought some of the items to be used at the unit and paid for it. These expenses were then claimed against the plaintiff. I do not see any other reason for the second defendant to take a personal interest in the said furnishing other than to satisfy his own personal choices as he was about to utilise the unit.

[146] I also note that according to the first defendant, the appointment of Amy Karya: (a) was undertaken in accordance with the plaintiff's internal policies and procedures; and (b) Shazarina, the first defendant's sister-in law, was not a representative of Amy Karya. Therefore, the first defendant did not allegedly put his interest in conflict with the plaintiff's. A similar argument was also put forth by the second defendant to deny liability on this issue.

[147] I do not accept the arguments put forth by the defendants. I find that Amy Karya was procured by the first defendant's wife, Puan Sri Bibi. The officers of the plaintiff from its procurement department had no choice but to accept the said proposal. The evidence shows that the officers agreed to the said appointment as Puan Sri Bibi and Shazarina had suggested the said appointment. The quotations and proposals were made through the first defendant's office as seen in the evidence of PW11, Kamsani. Even the recommendation dated 25 August 2015 prepared by PW11 to Dato Razak, the head of procurement showed that the said proposal was obtained through the first defendant's office.

[148] The involvement of the first defendant's wife and Shazarina can also be seen when they continued to chase for the payments on behalf of Amy Karya. If they were disinterested individuals in the said appointment, I do not see any reason why they had to chase payments for Amy Karya. Shazarina's involvement could also be seen from the evidence of Zuraida (PW6) and Kamsani (PW11). It is clear to this court that the first defendant's wife had been involved in detailed directions as to how the Unit A was to be furnished. The

passes granted to Amy Karya to undertake the work at the units also show that Shazarina was listed as one of the employees representing Amy Karya.

[149] I find that the involvement of the first defendant could be seen from the following facts that were helpfully summarised by the plaintiff's solicitors in their written submissions. I find that the evidence does support the position adopted by the plaintiff. I reproduce the plaintiff's summary of the relevant facts based on the evidence of the material witness and I agree to the same:

(a) on 28 October 2014, PW11 (the first defendant's secretary) received, inter alia, the keys and access cards for the Troika Units from DW3. 207 Around this time, PW11 was informed by PW12 that the defendants would occupy the Troika Units and was instructed to furnish the Troika Units;

(b) the first defendant's wife (Puan Sri Bibi) and the first defendant's sister-in-law (Puan Shazarina) were actively involved in the renovation and refurbishment of Unit A;

(c) in May 2015, PW11 received a call from Shazarina that she was calling on behalf of Puan Sri Bibi and informed that she intended to perform the refurbishment works for Unit A;

(d) PW11 also testified that he received another call from Puan Sri Bibi who informed him that Shazarina would be in charge of the works in Unit Shazarina and subsequently requested a meeting to discuss works for Unit A;

(e) on 8 June 2015, PW11 and Puan Shazarina met at Hotel Darby Park to discuss Unit A. 211 In this discussion, inter alia, Shazarina suggested installing curtains to Unit A and requested to visit Unit A;

(f) pursuant to the said request, the visit to Unit A was set up and PW11 testified that, during this visit, Puan Sri Bibi, Shazarina and her team did discuss the supply and refurbishment of Unit A 213;

(g) shortly after the visit, Shazarina contacted PW11 once again to enquire when the work would begin. When PW11 informed Shazarina that a proposal must first be submitted, Shazarina responded by saying that the proposal is with Puan Sri Bibi; and

(h) On 21 August 2015, PW11 received several documents which were forwarded to him by DW3. The documents are proposal papers from Amy Karya.

The evidence of PW11 is not credibly rebutted by the defendants. I also find that the first defendant did not challenge the evidence by producing Shazarina or even Puan Sri Bibi to deny these allegations. I find that the evidence before

me is not only strong at each strand but also the total strength of these strands when twisted together they make a rope that is strong to hang the defendants for the wrongs done to the plaintiff.

[150] For the above reasons I find the defendants have failed to ensure that their personal interests do not conflict with those of the company. The defendants did not act in accordance with the best interests of the company. I find that a reasonable honest and intelligent man in the position of a director of the company concerned, considering the background facts, would not 'have reasonably believed that the transaction was for the benefit of the company.'

[151] I find that the evidence on this issue when considered as a whole, shows on a balance of probabilities that the defendants are liable for breach of their duties against the company.

[152] The expenses incurred by the plaintiff for the units include, among others, the purchase of carpets, furniture, lighting, electricity, water, and even Astro bills. These must be repaid by the defendants to the plaintiff.

(F5) Finding 5 — That the second defendant did breach his duties to the plaintiff by abusing the carpool system

[153] This issue pertains only to the liability of the second defendant.

[154] The complaint that the plaintiff has against the second defendant are as follows:

(a) that the pool car system was set up not for its original purpose but was set up for the benefit of the second defendant;

(b) that the second defendant had absolute control over the cars within the pool car system and had used the majority of the cars for his own personal use; and

(c) that the second defendant had failed to negotiate the terms of leasing for the S500 and Brabus which resulted in the plaintiff having to pay leasing for the said cards for a period which is longer than necessary causing the plaintiff to incur substantial expenses.

(a) (i) Sub-issue 1 — Abuse of the pool car

[155] I find that the Board of Directors did agree to set up the car-pool system for the use of the senior management and members of the Board of Directors.

[156] Therefore, it is the responsibility of the second defendant to ensure that the intention of the Board is implemented. He must ensure that the directives

of the Board are complied with. He should have then set up a system to ensure that the cars leased would be made available for the use of the directors and even the senior management of the company. The cars must also be used only for work related to the company and not for any personal purpose.

[157] The evidence before me shows that:

(a) the keys to the cars were given to and kept by the first defendant's office on 1 July 2014;

(b) the cars were utilised by the second defendant. He had kept three units of the leased cars at his house. He had kept them at his house and used by his wife for her personal use and another by his son for his son's trip to college. The evidence also shows that the cars were used for choir trips;

(c) the cars were also used with the use of company drivers supplied by the plaintiff. There is no authority for the use of these company cars and the use of these drivers for the second defendant;

(d) the second defendant had also authorised one of the cars to be used solely by one of the directors of the plaintiff. This car was also kept by the director at his home until recalled by the company at a much later date. This should not have been allowed as it is contrary to the directives of the board; and

(e) the second defendant did not set up any system to allow any of the cars to be used by the other members of the board or by the senior management of the plaintiff. The keys were kept by his office and not by the Asset Management Department. He essentially controlled the use of the pool cars and there is no evidence that these cars were made available to the senior employees or other directors of the plaintiff.

[158] Therefore, the plaintiff has proven its case that the second defendant abused his powers and did breach his fiduciary duty to the plaintiff. He abused his powers to utilise the pool cars for his own use and wrongly allowed one of the directors to use one of the pool cars. This is not in accordance with the directive of the Board and the purpose of the pool cars. This is supported by the evidence of Fazli (PW17) and Rahim (PW18) and Shawal (PE19), an auxiliary police officer appointed to guard the second defendant's house. These vehicles were kept at the second defendant's premises and were used exclusively by him and his family. This fact was not credible denied by the second defendant. I also refer to the evidence of Zaidi Latiff (PW14) and Abdul Razak (PW13) concerning the use of the vehicles given wrongly by the second defendant to Dato' Yahaya and Dato Ehsanuddin contrary to the resolution of the Board of Directors.

[159] The plaintiff has also shown that he had absolute control over the cars and the management of the cars. As I said earlier, he did not set up a pool car system and did not advertise that the cars could be used by any of the directors or senior management for company business. The evidence of the directors called by the plaintiff shows that the second defendant did not inform them of the availability of the cars. Instead, he ensured that the keys were kept at his office and allowed the cars to be used for his wife, his family, and a select few members of the Board.

[160] I find that an honest and reasonable director would not have believed that the decision not to comply with the directors' directives and to use the cars for his personal use was in the best interests of the company. Therefore, I find that the actions of the second defendant are against the best interests of the company, and he has breached his duties to the plaintiff.

(ii) Sub-issue 2 — The failure to negotiate the terms of leasing for the S500 and Brabus

[161] On this issue, I do not find liability against the second defendant. I find that the plaintiff had erroneously agreed to the demands by Naza Venture Holdings Sdn Bhd when it agreed to pay the demand for the cancellation of the lease of these two units as if they were new lease arrangements from 17 February 2016.

[162] This cannot be attributed to the second defendant. The loss was caused by the failure of the plaintiff to insist on its legal position and had agreed to amicably settle the claim as seen in the proposal issued by Naza Venture Holdings Sdn Bhd dated 14 December 2017. I, therefore, opine that this loss is not attributable to the second defendant.

(F6) Finding 6 — That the second defendant breached his duties to the plaintiff by abusing the petrol card supplied to him and failed to return the same

[163] The final issue concerns the failure of the second defendant to return the petrol card that was supplied to him and the charges that were incurred by the plaintiff.

[164] In this case, the second defendant states that he had returned the petrol card with his official car but there is not an iota of evidence to show that this was undertaken by the second defendant.

[165] Furthermore, I accept the plaintiff's witness evidence, Rosli bin Selamat, who stated that various transactions would have exceeded the

engine capacity of the car supplied to the second defendant. This indicates that the petrol card was used for other purposes. It would be impossible to fill in the car beyond the capacity of the Mercedes Benz supplied to the second defendant.

[166] Therefore, the plaintiff is entitled to have these unlawful expenses reimbursed by the second defendant. It is the responsibility of the second defendant to return the said petrol card to the plaintiff and to ensure that the said petrol card was not abused. Failure to undertake this task renders him liable to the plaintiff for the expenses unlawfully incurred.

[167] For the aforesaid reason, I allow the plaintiff's claim on this issue against the second defendant for the unlawful expenses incurred. The second defendant should have ensured that the fuel card was returned to the plaintiff at the time when his contract was terminated, and that the facility provided to him was not abused.

(F7) Ancillary issues

[168] The first defendant did contend in his written submission that he should not be held to the same standard as he was only a non-executive director.

[169] I do not agree with this argument. As a Chairman and a nonexecutive director, he would still be subject to a minimum standard that is required from all directors. The duties of fidelity and single-minded loyalty to the company as laid down earlier apply to him and are of the same standard expected of all directors. See *Re Haeusler, Thomas* [2021] 4 SLR 1407 and *BIT Baltic Investment & Trading Pte Ltd (in compulsory liquidation) v Wee See Boon* [2023] SGCA 17.

[170] The defendants also rely on s 214 of the Companies Act/business judgment rule and they say that they had allegedly acted honestly and reasonably. I do not accept the actions of the defendants are honest or even reasonable. I find that the defendants did not act as would have been expected of an honest and reasonable director. The actions of the defendants, where I find liability against them, were not undertaken honestly and were not in the best interests of the company.

G. OVERALL EVALUATION OF EVIDENCE

[171] When I consider the evidence presented by the litigants as a whole, I find that I prefer the testimonies of the plaintiff's witnesses to those of the defendants. I find that the plaintiff's witnesses' testimonies were consistent with documentary evidence before this court and are not coloured by any

prejudice or bias against the defendants.

[172] There is an overall arching principle that the defendants had breached. As the Chairman and CEO of the plaintiff, they must not put themselves in a position of conflict and must always act in what would be in the best interest of the company. They should have:

(a) disclose to the board that they were going to utilise the said units and change their use contrary to what was deliberated and decided by the board earlier;

(b) that the units will be furnished in accordance with their needs and tastes with the involvement of their family members;

(c) that the units will be maintained by the plaintiff and they will benefit from the said use;

(d) the second defendant had wrongly used the pool cars and gave exclusive use of the two vehicles to some members of the board; and

(e) The second defendant should not have abused the petrol card supplied to him. The second defendant should have also ensured that the petrol card was returned to the plaintiff.

For the above reasons and those stated earlier, I find that the defendants did breach their duties to the plaintiff.

H. DAMAGES AGAINST THE DEFENDANTS

(H1) Claim against the first defendant

[173] I find that the plaintiff have proven their claims for the following special damages against the first defendant:

Claim against the first defendant

(a) Loss of use of Unit A = RM9,600 x 22 = RM211,200;

(b) Costs of furnishing of Unit A = RM295,130; and

(c) Costs of the expenses incurred for Unit A = RM184,172.61.

[174] I allowed the claim for the loss of use based on the rental that could have been obtained for the said unit in accordance with the opinion of the plaintiff's witness, Foo Gee Jen. I find that his opinion on the rental comparable for a similar type of property is correct and consistent with the available evidence before me.

[175] I refer to the decision of Andrew Phang JA of the Singaporean Court of

Appeal in *Sim Poh Ping v Winsta Holding Pte Ltd and another and other appeals* [2020] SGCA 35; [2020] 1 SLR 1199, where the Singaporean Court, when dealing with the three possible methods of measuring the damages attributable to a person who commits a breach of trust or breaches his or her fiduciary duties had this to say:

> 245 There are good reasons why fiduciaries ought to be treated differently from other actors, and therefore why deterrence and prophylaxis are more pressing concerns when dealing with breaches of fiduciary duties. As has been referred to in several of the judgments we have examined above, and compellingly summarised by McLachlin J in the extract from *Canson Enterprises* ([147] supra) excerpted above at [150], the fiduciary's relationship with his principal is quite unlike the relationship of commercial parties trading with each other at arms' length. The core differences are these. At common law, the starting point is that the innocent party and the wrongdoing party are independent actors, standing on equal ground, capable of taking care of their respective positions. Consistently with the notion of equal actors, the common law in awarding damages to compensate the innocent party will have regard to the interests of the wrongdoing party, despite his or her wrongdoing, by keeping his or her liability within reasonable limits. The remedial response of the common law is therefore to compensate the innocent party only for his loss, with punitive damages to be awarded in rare cases. There is no element of deterrence manifest in the remedies provided in common law (see, for example, *QAM* at[37] and [40] and *Canson Enterprises* at [3] per McLachlin J).
>
> 246 In contrast, the starting point in equity is the trust and confidence reposed in the wrongdoing fiduciary by the innocent principal. The relationship between the wrongdoing fiduciary and the innocent principal is not one where both occupy equal footing, but rather one of *dependence* by the principal on the fiduciary. *The principal relies on the fiduciary to act in his or her best interests, and is especially vulnerable to the fiduciary's breach of duty. Indeed, the High Court in Kumagai-Zenecon (HC) ([136]) has observed that a fiduciary owes his or her principal 'the highest standard [of duty] known to the law' (at [13])*.
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> 247 *In attempting to ensure that fiduciaries do not abuse the power given to them, and also to ensure that fiduciaries are not tempted or distracted from acting in the best interests of their principals, fiduciary law has always embodied elements of deterrence and prophylaxis* (see *QAM* at [38] and [41]; *Hodgkinson v Simms* ([154]) at [93] per La Forest J). *Equity intervenes not so much to recoup a loss suffered by the plaintiff as to hold the fiduciary to and vindicate the high duty owed to the plaintiff. Hoo JC recognised this in Beyonics Technology (HC) ([143]), when she observed that the high standards demanded of a fiduciary justified a strict approach to be taken against wrongdoing fiduciaries: 'where the fiduciary acts in derogation from his core obligation of single-minded loyalty to his principal and prefers his own interest, the principal should not have to bear the heavy burden of proving strict 'but for' causation'* (at [137]).

[176] As the plaintiff has proven that the furnishing of Unit A is unlawful, I find that the first defendant should compensate the plaintiff for the costs incurred for furnishing of the said unit.

[177] I also find that the first defendant should also be liable for the costs incurred by the plaintiff to maintain Unit A during his stay. The above finding is based on the evidence of Nor Azira (PW21), the plaintiff's head of finance who has reviewed the SAP system and cross-checked it with available supporting documents. I accept her evidence as being correct and credible.

(H2) Claim against the second defendant

[178] I find that the plaintiff have proven their claims for the following special damages against the second defendant:

Claim against the second defendant:

(a) loss of use of Unit B = 11 months and 16 days x RM5,700 = RM68,400;

(b) costs of furnishing of Unit B = RM207,505.18;

(c) costs of the expenses incurred for Unit B = RM97, 591.95;

(d) costs of the Pool Cars = RM; and

(e) petrol card up to 14 April 2016 = RM10,837.10;

[179] I make the said finding based on the same reasoning stated earlier against the first defendant.

[180] To be clear, I state that I make the above determination concerning the sums spent by the plaintiff to furnish and maintain the units against both defendants is also based on the evidence of PW21 (Nor Azira), the plaintiff's head of Finance. I repeat that she had reviewed the SAP system and cross-checked the available documents. I find that the plaintiff had to incur the expenses to the Troika units used by the defendants. I find her evidence is correct and she is a reliable witness.

[181] In addition to the above, I also find as the plaintiff has proven the claim for the pool cars and the petrol card, the second defendant should compensate the plaintiff for the losses suffered for the payments made. As the cars were wrongly used by the second defendant, he should repay the plaintiff for the costs of the leasing incurred by the company. I also allow part of the claim for the petrol card against the second defendant.

[182] On the costs of the pooled cars, I find that the plaintiff's calculations as to the losses incurred by the plaintiff reflect a reasonable amount of damages that is incurred by the plaintiff as a result of the defendant's breach. The purpose of damages when dealing with a breach of fiduciary duty is to restore the principal to the position it was in before the breach and to make good any loss caused by the said breach. See *Parker v Tucker (No 2)* [2010] FCA 624 and

New Acres Sdn Bhd v Sri Alam Sdn Bhd [2000] 2 MLJ 353.

[183] Below is a summary of the particulars of the loss of use of the Pool Cars that should be compensated by the second defendant:

No	Description	Amount (RM)
(a)	MCB E250 (WXX 7772)	140,941.63
(b)	MCB E250 (WA 9451 E)	571,740
(c)	Toyota Vellfire (WA 348 F)	681,690
	Total	1,394,371.63

[184] I find that these are the cars that were used by him and his family. As to the use of the two other cars wrongly by the directors, I find that damages should not be claimed for the full rental of the said vehicles as they were used by the other directors. Nonetheless, as I have found a breach of his fiduciary duty concerning the two other vehicles I allow damages of RM50,000. Therefore, the total sum of RM1,444,371.63 is payable by the second defendant to the plaintiff.

[185] As to how the amount of loss suffered was measured, I adopt the position adopted by counsel for the plaintiff which is summarised below:

(a) the amount in respect of MCB (WXX 7772) was derived using this formula:

A (Value of the car when the Leased Cars were delivered, ie 25 June 2014) – B (price of the car when it was eventually sold) + C (maintenance costs from 25 June 2014 to the date of the sale) = D

(b) based on the formula above:

A (RM300,000.00368) – B (RM182,020.20369) + C (RM22,961.83) = D (RM140,941.63)

[186] For the cars — MCB E250 (WA 9451 E) and Toyota Vellfire (WA 348 F) — these damages are based on the leasing/rental paid by the plaintiff up to the date of the termination as recorded by the plaintiff as explained by PW21.

(H3) Exemplary damages

[187] I find that this is a suitable case where this court should exercise its discretion in imposing exemplary damages against the defendants.

[188] I refer to the decision of the Court of Appeal in *Tradewinds Properties Sdn Bhd v Zulhkiple bin A Bakar & Ors* [2019] 1 MLJ 421; [2019] 2 CLJ 261 where Hasnah Mohammed Hashim JCA (as she then was) held:

> [49] The concept of exemplary damages has been explained by this court in *Sambaga Valli KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; [2017] 1 LNS 500:
>
> > [33] The exemplary damages or punitive damages — the two terms now regarded as interchangeable — are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff (see *Rookes v Barnard* [1964] 1 All ER 347; *A B v Southwest Water Services* [1993] All ER 609; *Broome v Cassell & Co* [1971] 2 QB 354; *Laksamana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675; [2005] 4 CLJ 871).
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> [50] There are two categories provided in the case of *Rookes v Barnard*, for claim of exemplary damages:
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> > ... The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category — I say this with particular reference to the facts of this case — to oppressive action by private corporations or individuals. *Cases in second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff* ...
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> [51] In this instant appeal, the plaintiff sought exemplary damages. In claiming exemplary damages under the second category, the plaintiff must be able to prove that the defendants have made a profit for themselves.
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> [52] James Foong J (as he then was) in *Roshairee Abd Wahab v Mejar Mustafa Omar & Ors* [1996] 3 MLJ 337; [1997] 1 CLJ Supp 39 had set the guidelines for awarding exemplary damages:
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> > While considering the request for exemplary damages, this court must bear in mind that the objective for an award under this category is to punish the defendants, and to display the court's indignant attitude towards the acts committed by the defendants. However, from the enlightening judgment of *Lord Devlin in Rookes v Bernard* [1946] AC 1129, such damages must be restricted to situations where there are:
> >
> > > ... oppressive, arbitrary or unconstitutional action by the servants of the Government' *or where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.*
> >
> > Outside these two categories, exemplary damages should not be awarded.

A [53] This court in *Sambaga Valli KR Ponnusamy* explained with clarity that exemplary damages are not intended to compensate the plaintiff and are not recoverable as a matter of right:

> ... we would like to emphasise again that exemplary damages are not intended to compensate the plaintiff and are not recoverable as a matter of right. *The amount of the exemplary damages award is left to the judge's discretion and is determined by considering the character of the defendant's misconduct, the nature and extension of the plaintiff's injury and the means of the defendant.* The quantum of exemplary damages to be awarded must be appropriate to the wrongdoing inflicted to the parties involved. Exemplary damages must not be uncontrolled or arbitrary; they must be of an amount that is the minimum necessary to achieve their purpose in the context of the particular case.

[189] I find that their decisions as found above, fall short of what would be expected of an honest director. I find that their actions had caused damage to the plaintiff and had benefited them personally.

[190] As directors and as fiduciaries to the plaintiff, the defendants should have taken all reasonable steps to restrain themselves from being put in a position of conflict. I have also considered the nature of the wrongs found against the defendants, their positions within the company, and the importance of ensuring that members of the board of directors of public listed companies are aware of their duties and not to act contrary to their duties owed to their companies.

[191] I find that the defendants' conduct is unacceptable and have shown that they have both failed to act in the best interests of the plaintiff. As the highest two office bearers of the plaintiff, one expects that they will ensure that their actions are beyond reproach. To use company monies and company assets for one own benefit in disregard of the directives of the board and contrary to the best interests of the company should be subject to an award of exemplary damages against them. I have also considered the importance of this issue when dealing with public listed companies. Directors must be reminded of the importance that they act solely in the best interest of the company. I also find that they have benefited personally from the above wrongs and the above actions show that they have not acted in good faith.

[192] For the above reasons, I award exemplary damages to the sum of RM300,000 against the first defendant and RM500,000 against the second defendant to be paid to the plaintiff. I have considered the factors laid down in *Toyota Tsusho (Malaysia) Sdn Bhd v Foo Tseh Wan & Ors* [2023] MLJU 289; [2023] 1 LNS 227 which have been helpfully summarised by Noorin Badaruddin J as follows:

> [464] To determine the appropriate quantum of exemplary damages, the High

Court in *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 held that the award is to be moderate and that the court should take into account the following factors:

(a) *the resources of the parties;*

(b) the quantum of the compensatory award;

(c) the conduct of the parties until the date of judgment; and

(d) that the quantum of award should reflect the gravity of the wrong.

[466] Generally, the Malaysian courts have awarded 25% of the award of compensatory damages as exemplary damages. See the cases of:

(a) *Big Man Management Sdn Bhd v Tenaga Nasional Bhd* [2020] 11 MLJ 472 (HC);

(b) *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2017] 1 LNS 500 (CA);

(c) *Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515 (CA);

(d) *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352 (HC); and

(e) *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443 (HC).

[193] I have imposed a higher sum against the second defendant as he was the CEO of the company. He was the highest-ranking executive officer of the company and should have taken all steps to prevent the abuse of the company's assets. Instead, as seen above, the Malay proverb states 'Harapkan Pagar, Pagar Makan Padi.' Therefore, I find that a higher sum should be imposed against him to warn those within the industry that this will not be tolerated.

[194] In relation to costs, I direct the defendants pay to the plaintiff each cost to the sum of RM200,000 subject to allocator. This is due to the number of days incurred for this trial, the seniority of counsels involved, the complexity of this case, and the importance of this case to the litigants.

I. ORDERS OF THIS COURT

[195] Based on the aforesaid, I make the following orders against the defendants:

Against the first defendant:

(a) the first defendant pay to the plaintiff the total sum of RM990, 502.61:

(i) Loss of use of Unit A = RM 9600.00 x 22 = RM211,200.00

A (ii) Costs of furnishing of Unit A = RM 295, 130.00

(iii) Costs of the expenses incurred for Unit A = RM 184, 172.61

(iv) Exemplary Damages of RM 300,000.00

B (b) Cost of RM 200,000.00 subject to allocator

Against the second defendant:

(a) the second defendant pay to the plaintiff the total sum of RM2,328,705.86

C (i) loss of use of Unit B = 11 months and 16 days x RM 5,700 = RM 68,400;

(ii) costs of furnishing of Unit B = RM207,505.18;

D (iii) costs of the expenses incurred for Unit B = RM97,591.95;

(iv) costs of the Pool cars = RM1,444,371.63;

(v) petrol card up to 14 April 2016 = RM 10,837.10; and

(vi) exemplary damages of RM500,000.

E (b) cost of RM200,000 subject to allocator; and

(c) interest shall be chargeable on the total judgment sum and costs at 5%pa from the date of judgment to the date of realisation. This is applicable for both defendants.

F *Plaintiff's claim allowed.*

Reported by Ashok Kumar

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